## Subject Index


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| A. Questions presented by the petition | 2 |
| B. Questions assigned by the court | 5 |
| Statutes involved | 6 |
| Statement | 7 |
| 1. The product involved is frozen fruit pies | 8 |
| 2. Petitioner was a small family enterprise with long experience in the pie business | 10 |
| 3. Utah Pie marketed frozen pies in nine western states | 12 |
| 4. There was evidence that advertising allowances are not price cuts | 14 |
| 5. Respondents were all enormous conglomerate corporations with vast financial resources | 15 |
| 6. Utah Pie's case against Pet | 16 |
| a. Pet's price discriminations | 18 |
| (i) Overall discriminations shown by annual average prices | 18 |
| (ii) Pet-Ritz/Bel Air discriminations | 19 |
| (iii) Pet-Ritz/Pet-Ritz discriminations | 24 |
| (iv) Swiss Miss/Swiss Miss discriminations | 27 |
| b. There was evidence of Pet's predatory tactics in its dealings in petitioner's trading area | 27 |
| (i) "Investment spending" | 27 |
| (ii) Industrial espionage | 28 |
| (iii) The Swiss Miss fighting brand | 31 |
| (iv) Discriminations themselves as evidence of intent | 32 |
| (v) Pet's Safeway contract was anticompetitive | 32 |

Page

7. Petitioner's case against Carnation ..... 33
   a. Carnation's price discriminations ..... 34
   b. Carnation's sales in all markets ..... 40
   c. Carnation's sales were at a loss planned in advance 41
8. Petitioner's case against Continental ..... 44
   a. Continental's Morton Pie ..... 45
   b. Continental's marketing system ..... 46
   c. Continental engaged in significant and sustained price discrimination in plaintiff's trading area .... 48
   d. The evidence showed that Continental intended to injure plaintiff ..... 52
9. The evidence showed that respondents' price discriminations had an injurious impact upon Utah Pie ..... 54
   a. The evidence showed that petitioner's prices were driven down ..... 55
   b. The evidence showed that petitioner's market share declined ..... 56
   c. The jury verdicts were well within the evidence ... 57

Summary of argument ..... 59

Argument ..... 66

1. Respondents' conduct posed an "incipient" threat to competition under Clayton Act standards ..... 66
   a. Sections 2, 3, and 7 of the Clayton Act embody the same test ..... 66
   b. Sections 2, 3, and 7 of the Clayton Act all deal with the misuse of market power to foster monopoly .... 67
   c. The large conglomerate enterprise is a threat to competition without more ..... 69
   d. Discriminatory pricing by large conglomerate enterprises threatens competition ..... 71
2. The Court of Appeals' opinion conflicts with the Fourth Circuit's Maryland Baking decision ..... 74

Page

3. The Court of Appeals has ignored all of the controlling Clayton Act principles in reversing the jury in this case 77
   a. The Court of Appeals ignored high and apparently growing concentration in this industry ..... 78
   b. The Court of Appeals apparently considered each respondent's price discriminations as if they had occurred in a vacuum ..... 80
   c. Discriminatory price cuts by a major competitor injure a competitor by depressing market prices as well as by diverting business ..... 81
4. All respondents engaged in substantial price discriminations ..... 83
   a. The Court of Appeals ignored both the facts and the applicable law in assessing the extent of respondents' price discriminations ..... 85
   b. Respondents' quantity discounts were not justified.. 89
   c. Pet's private-label discriminations were substantial, sustained, and posed a serious threat to competition 90
   d. Respondents discriminate without statutory justification at their peril ..... 93
5. Evidence of intent to destroy a competitor supports a jury finding of an incipient threat to competition ..... 95
   a. Discriminatory low prices charged by respondents at places distant from their plants are evidence of predatory intent ..... 96
   b. Sales at a loss are a classic predatory practice, intentionally engaged in by all respondents ..... 97
   c. Utah Pie was the principal target of Pet's and Continental's discriminations as shown by direct evidence ..... 101
      (i) Continental's discriminatory prices were admittedly aimed directly at Utah Pie ..... 101
      (ii) Pet's discriminatory prices were aimed at Utah Pie ..... 102
      (iii) Industrial espionage is a common concomitant of monopoly and evidence of predatory intent 103

Page

(iv) Pet employed the Swiss Miss as a "fighting brand" in Utah Pie's trading area ..... 105

6. The Court of Appeals invaded the jury's province by accepting and relying upon controverted evidence and inferences unfavorable to Utah Pie ..... 106

a. The tables appended to the Court of Appeals' opinion conflict with other evidence and inferences in the case ..... 110

b. The Court of Appeals has failed to make any distinction between wholesale and retail market areas for pies ..... 111

c. The Court of Appeals accepted Pet's controverted evidence on the Safeway contract ..... 112

d. The jury was not required, as a matter of law, to accept Pet's cost justification for the discriminatory Bel Air price ..... 115

e. The Court of Appeals ignored the evidence of the adverse impact of respondents' price discriminations on the goodwill of the Utah Pie Co. ..... 119

f. The Court of Appeals placed undue emphasis on post-complaint evidence ..... 119

7. The instructions on remand were erroneous and an abuse of discretion ..... 121

a. The Court of Appeals did not consider all of Utah Pie's evidence ..... 121

b. Denver was in issue throughout the trial ..... 122

c. If this court affirms the judgment and order of the Court of Appeals directing the District Court to enter judgment for respondents, may Utah Pie then make a motion for a new trial under Rule 50(c) of the Federal Rules of Civil Procedure within 10 days of the District Court's entry of judgment for respondents? ..... 128

d. If under the order of the Court of Appeals, petitioner cannot make a motion for new trial under Rule 50(c)(2) within 10 days of the District Court's

Page

entry of judgment against him, is the order of the Court of Appeals directing the District Court to enter judgment for respondents compatible with Rule 50(b) as interpreted by this court in Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212; Globe Liquor Co. v. San Roman, 332 U.S. 571; and Weade v. Dichman, Wright & Pugh, 337 U.S. 801? . . 130

e. Does Rule 50(d) of the Federal Rules of Civil Procedure provide the Court of Appeals with any authority to direct the entry of judgment for respondents? ..... 137

8. Utah Pie should have judgment for costs, including a reasonable attorney's fee ..... 141

Conclusion ..... 141

## Table of Authorities Cited


| Cases | Pages |
|---|---|
| Alles Corp. v. Senco Products, Inc., 329 F.2d 567 (6th Cir. 1964) | 95 |
| American Can Co. v. Ladoga Canning Co., 44 F.2d 763 (7th Cir. 1930) | 141 |
| American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944), affirmed 328 U.S. 781, 66 S.Ct. 1125 | 76, 83, 104 |
| American Tobacco Co. v. United States, 221 U.S. 106, 31 S.Ct. 632 | 68, 81, 97 |
| Anderson v. Shipowners Association, 31 F.2d 539 (9th Cir. 1929) | 121 |
| Atlantic & Gulf Stevedores, Inc. v. Ellerman, 369 U.S. 355, 82 S.Ct. 780 (1962) | 139 |
| Atlas Scraper & Eng'r. Co. v. Pursche, 357 F.2d 296 (9th Cir. 1966) | 128 |
| Automatic Canteen Co. v. FTC, 346 U.S. 61, 73 S.Ct. 1017 | 116 |
| Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (1955), cert. denied 350 U.S. 991 | 95 |
| Ben Hur Coal Co. v. Wells, 242 F.2d 481 (10th Cir. 1957), cert. denied 354 U.S. 910 | 95 |
| Bigelow v. RKO Radio Pictures, 327 U.S. 251, 66 S.Ct. 574 | 119 |
| Broadcast Music Co. v. Havana Madrid Restaurant Corp., 175 F.2d 77 (2d Cir. 1949) | 107 |
| Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502 | 59, 66, 68, 95 |
| Byrd v. Blue Ridge Rural Elec. Co-op, Inc., 356 U.S. 525, 78 S.Ct. 893 (1958) | 65, 134, 139 |
| Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 | 5, 6, 65, 130, 140 |
| Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404 | 64, 105, 108 |
| Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726, 65 S.Ct. 961 | 72, 88, 96, 97 |
| E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944) | 97 |
| E. Edelmann & Co. v. Federal Trade Commission, 239 F.2d 152 (7th Cir. 1957), cert. denied 355 U.S. 941, 78 S.Ct. 426 | 72, 73 |

Pages

Ellis v. Union Pac. Ry. Co., 329 U.S. 649, 67 S.Ct. 598.... 108
Empire Rayon Yarn Co., Inc. v. American Viscose Corp., 354 F.2d 182 (2d Cir. 1965), overruled 1966 Trade Cases Para. 71,841; petition for cert. filed, 35 U.S.L. Week, 3140, No. 636 ..... 88

Fleniken v. Great American Indemnity Co., 142 F.2d 938 (5th Cir. 1944) ..... 128
FTC v. A. E. Staley Mfg. Co., 324 U.S. 746, 65 S.Ct. 971..68, 96
FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 80 S.Ct. 1267 .....60, 66, 68, 76, 83, 95
FTC v. Borden Co., 383 U.S. 637, 86 S.Ct. 1092..... 90
FTC v. Cement Institute, 333 U.S. 683, 68 S.Ct. 793.....87, 96
FTC v. Consolidated Foods Corp., 380 U.S. 594, 85 S.Ct. 1220 ..... 120
FTC v. Morton Salt Co., 334 U.S. 37, 68 S.Ct. 822.....72, 89
FTC v. Simplicity Pattern Co., Inc., 360 U.S. 55, 79 S.Ct. 1005 ..... 88

Garman v. Metropolitan Life Ins. Co., 175 F.2d 24 (3d Cir. 1949) ..... 132
Gerber Products Co. v. Beech-Nut Life Savers, 160 F.Supp. 916 (S.D.N.Y. 1958) ..... 83
Giant Food, Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962), cert. denied 372 U.S. 910..... 86
Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457..... 107
Globe Liquor Co. v. San Roman, 332 U.S. 571, 68 S.Ct. 246 .....6, 65, 130
Gunning v. Cooley, 281 U.S. 90, 50 S.Ct. 231..... 108
Guyott Co. v. Texaco, Inc., ___ F.Supp. ___ (D. Conn. 1966) 1966 Trade Cases Para. 71,835 ..... 88

H. J. Heinz Co. v. Beech-Nut Life Savers, Inc., 181 F.Supp. 452 (S.D.N.Y. 1960) ..... 73
Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916 (5th Cir. 1962)..... 86

International Business Machines Corp. v. United States, 298 U.S. 131, 56 S.Ct. 701..... 68
International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12 .....60, 68

Pages

Johnson v. N.Y., N.H. & H. R.R. Co., 344 U.S. 48, 73 S.Ct. 125 (1952) ..... 128
Joseph E. Seagram & Sons, Inc. v. Hostetter, 382 U.S. 924, 86 S.Ct. 10 ..... 94

La Peyre v. FTC, ___ F.2d ___ (5th Cir. 1966), 1966 Trade Cases Para. 71,881 ..... 94
Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740..... 107
Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), cert. denied 377 U.S. 993..... 95
Lloyd's of London v. Cordova Airlines, Inc., 283 F.2d 659 (9th Cir. 1960) ..... 132
Lorain Journal v. United States, 342 U.S. 143, 72 S.Ct. 181 95

Maryland Baking Co. v. FTC, 243 F.2d 716 (1957).....74, 75
Moore v. Mead Service Co., 190 F.2d 540 (10th Cir. 1951) 94
Moore v. Mead's Fine Bread Co., 348 U.S. 115, 75 S.Ct. 148 .....60, 73, 95

Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 78 S.Ct. 352 (1958) ..... 133
NLRB v. Dinion Coil Co., 201 F.2d 484 (2d Cir. 1952).... 107
National Dairy Products Corp. v. United States, 350 F.2d 321 (8th Cir. 1965), vacated, remanded on other grounds, ___ U.S. ___, 86 S.Ct. 1913..... 100
New York, N.H. & H. R.R. Co. v. Henagan, 364 U.S. 441, 81 S.Ct. 198 (1960)..... 132
North Texas Producers Association v. Young, 308 F.2d 235 (5th Cir. 1962) ..... 141

Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477..... 118
Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S.Ct. 486 .....62, 107, 139

Quack Ting v. United States, 140 U.S. 417, 11 S.Ct. 733... 107
Quinby v. Morrow, 340 F.2d 584 (2d Cir. 1965)..... 132

R. H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964)....64, 86

Samuel Goldwyn v. Twentieth Century Fox, 328 F.2d 190 (9th Cir. 1964) ..... 141
Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945), cert. denied 326 U.S. 734, 66 S.Ct. 44.....73, 81

Pages

Sartor v. Arkansas National Gas Corp., 321 U.S. 620, 64 S.Ct. 724 (1944) ..... 107
Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173 ..... 108
Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401, 19 S.Ct. 233 ..... 107
Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir. 1945), cert. denied 326 U.S. 774 ..... 86
Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502 ..... 68, 104, 105, 106
Standard Oil Co. of Calif. v. United States, 337 U.S. 293, 69 S.Ct. 1051 ..... 64, 81, 110
Story Parchment Co. v. Patterson Parchment Co., 282 U.S. 555, 51 S.Ct. 248 ..... 119
Swift & Co. v. United States, 196 U.S. 375, 25 S.Ct. 276 ..... 95

Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694 (9th Cir. 1964) ..... 86

Union Leader Corp. v. Newspapers of New England, Inc., 180 F.Supp. 125 ..... 120
United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632 ..... 68, 81, 97
United States v. Borden Co., 370 U.S. 460, 82 S.Ct. 1309 ..... 89, 116, 117
United States v. Continental Can Co., 378 U.S. 441, 84 S.Ct. 1738 ..... 64, 120
United States v. du Pont & Co., 351 U.S. 377, 76 S.Ct. 994 ..... 77
United States v. General Electric Co., 82 F.Supp. 753 (D. N.J. 1949) ..... 105
United States v. General Motors, 384 U.S. 127, 86 S.Ct. 1321 ..... 104
United States v. Griffith, 334 U.S. 100, 68 S.Ct. 941 ..... 76, 77
United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698 ..... 77
United States v. Pabst Brewing Co., 384 U.S. 546, 86 S.Ct. 1665 ..... 60, 68, 80
United States v. Paramount Pictures, Inc., 334 U.S. 131, 68 S.Ct. 915 ..... 76
United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503 ..... 120
United States v. Penn-Olin Chemical Co., 378 U.S. 158, 84 S.Ct. 1710 ..... 73, 79

Pages

United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715 ..... 66

United States v. Von's Grocery Co., 384 U.S. 270, 86 S.Ct. 1478 ..... 60, 68, 79

Volasco Products Co. v. Lloyd A. Fry Roofing Co., 346 F.2d 661 (6th Cir. 1965), cert. denied 382 U.S. 904 ..... 83

Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172, 86 S.Ct. 347 ..... 68

Weade v. Dichman, Wright & Pugh, 337 U.S. 801, 69 S.Ct. 1326 (1949) ..... 6, 65, 130, 133, 135, 139

White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696 (1963) ..... 139

Yorkshire Indemnity Co. v. Roosth & Genecov Prod. Co., 252 F.2d 650 (5th Cir. 1958) ..... 132

## Constitutions

United States Constitution, Amendment VII ..... 6, 110

## Rules

Federal Rules of Civil Procedure:

Rule 50 (308 U.S. 63 (1938)) ..... 6

Rule 50 (as amended January 21, 1963, effective July 1, 1963, 374 U.S. 885, 83 S.Ct. 27) ..... 5, 6, 9, 30, 65, 121, 127, 128, 129, 130, 131, 136, 137, 138, 139, 140

Rule 59(b) ..... 139

Rule 60(b) ..... 139

Supreme Court Rule:

Rule 57 ..... 141

## Statutes

Clayton Act:

Section 2, 38 Stat. 730, §2 (1914), as amended by Robinson-Patman Act, 49 Stat. 1526, §1 (1936), 15 U.S.C. §13 (1964) ..... 4, 6, 7, 59, 61, 66, 67, 68, 73, 86, 88, 89, 93, 95, 125

Pages

Section 3, 38 Stat. 731, §3 (1914), 15 U.S.C. §14 (1964) ..... 6, 59, 66, 67, 68
Section 4, 38 Stat. 731, §4 (1914), 15 U.S.C. §15 (1964) ..... 6, 141
Section 7, 38 Stat. 731, §7 (1914), amended by 64 Stat. 1125 (1950), as amended, 15 U.S.C. §18 (1964) ..... 6, 59, 66, 67, 80
Section 16, 38 Stat. 737, §13 (1914), 15 U.S.C. §26 (1964) ..... 6

Sherman Act, Section 1 ..... 7

28 U.S.C. Section 1254(1) ..... 2

28 U.S.C. Section 2106 ..... 129

**Texts**

Kaplan, Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II), 77 Harv. L. Rev. 801, 818-820 (1964) ..... 136

Robinson, Joan, Economics of Imperfect Competition, 179 (London, 1934) ..... 96

28 U.S.C.A. Rule 50 pocket part (1965) p. 185 ..... 138

**Miscellaneous**

Atty. Gen. Nat'l Comm. Antitrust Rep. 178 ..... 94

Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 88th Cong., 2d Sess., Economic Concentration Part I, Overall and Conglomerate Aspects ..... 69, 71

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1966

No. 18

UTAH PIE COMPANY,
*Petitioner,*

vs.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF FOR THE PETITIONER

### OPINION BELOW

The opinion of the Court of Appeals (R. 1451) is reported at 349 F.2d 122 and CCH 1965 Trade Cases ¶ 71,468.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1965 (R. 1526). The petition was filed on August 23, 1965, and was granted November 15, 1965 (R. 1527). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

---

## QUESTIONS PRESENTED

### A. Questions Presented by the Petition.

The Court of Appeals reversed judgments entered on jury verdicts in favor of petitioners because it found no evidence sufficient to support the jury's verdicts that respondents' price discrimination were reasonably likely to substantially lessen competition or to tend to create a monopoly, within the meaning of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act. The undisputed facts showed:

a. That petitioner was a small corporation, with limited financial resources, engaged solely in the business of making fresh and frozen pies, which it sold in the inter-mountain area, where it had the only pie plant;

b. Respondents were all large corporations, each engaged in a variety of businesses of which its frozen pie business was a small part;

c. Respondents all had substantial resources in the form of multi-million dollar over-all profits;

d. Respondents all distributed frozen pies throughout all or most of the United States;

e. Respondents all sold substantial numbers of frozen pies in the area in which they competed with petitioner at

prices below the prices which respondents charged for pies of like grade and quality in areas in which they did not compete with petitioner;

f. Respondents had net losses on their sales of frozen pies in the area in which they did compete with petitioner; and

g. Prices in petitioner's trading area fell and petitioner's market share declined.

The questions presented are:

1. Are these facts alone sufficient to sustain a jury's verdict finding a reasonable likelihood of a substantial lessening of competition or a tendency to create a monopoly arising out of respondents' price discriminations?

2. Are these facts sufficient to sustain the jury's verdict if there is also evidence that there were 200 manufacturers of frozen pies in the United States, but that only petitioner and respondents made more than sporadic sales in the area in which petitioner sold frozen pies?

3. Are these facts sufficient to sustain a jury's verdict if there is also evidence that each respondent's price discriminations were motivated by predatory intent directed at petitioner?

a. Is evidence that a respondent planned in advance to take losses on frozen pie sales in the area in which it competed with petitioner evidence of predatory intent?

b. Is evidence that a respondent indulged in industrial espionage to obtain information for use against petitioner evidence of predatory intent?

c. Is evidence that a respondent's discriminatory low price in petitioner's trading area cut deeply below previously prevailing price levels evidence of predatory intent?

4. Can a difference between a manufacturer's price for its proprietary, "name" brand in one geographic area and the manufacturer's price for a substantially identical "private label" product in a different geographic area be an unlawful price discrimination under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act?

5. Is diversion of business to the discriminating seller the only criterion of competitive effect of a manufacturer's discriminatory price for a "private label" product, or should the Court of Appeals also have considered evidence of the impact of discriminatory prices for private label products upon the general price level in the market as a whole, and its probable ultimate effect upon the structure of the market?

6. Did the Court of Appeals, in overturning the jury's verdict on grounds of insufficient evidence, usurp the function of the jury, and deny petitioner's constitutional right to trial by jury, by failing to consider the evidence in the light most favorable to petitioner, and by failing to give petitioner the benefit of all reasonable inferences from the evidence so considered?

a. Did the Court of Appeals, in overturning the jury's verdict, improperly treat an "advertising allowance" as a "discount" where the unequivocal testimony of several witnesses was that an advertising allowance is *not* a price cut?

b. Did the Court of Appeals, in overturning the jury's verdict, improperly rely upon the testimony of interested defense witnesses who petitioner contended were lying, and whose credibility was a principal issue in the case?

c. Did the Court of Appeals, in overturning the jury's verdict, place unwarranted reliance upon post-complaint evidence by ignoring the reasonable inference that respondents ameliorated their pricing practices after the complaint in this action was filed?

7. Could the Court of Appeals properly disregard the evidence of respondent Continental's Denver price discriminations, on the grounds that the District Court's charge did not submit that issue to the jury, and then order entry of judgment in favor of Continental without a new trial?

**B. Questions Assigned by the Court.**

1. Whether, if this Court affirms the judgment and order of the Court of Appeals directing the District Court to enter judgment for respondents, petitioner can then make a motion for new trial under Rule 50(c)(2) of the Federal Rules of Civil Procedure within 10 days of the District Court's entry of judgment for respondents?

2. Whether, if under the order of the Court of Appeals, petitioner cannot make a motion for new trial under Rule 50(c)(2) within 10 days of the District Court's entry of judgment against him, the order of the Court of Appeals directing the District Court to enter judgment for respondents is compatible with Rule 50(b) as interpreted by this Court in *Cone v. West Virginia Pulp &*

*Paper Co.*, 330 U.S. 312; *Globe Liquor Co. v. San Roman*, 332 U.S. 571; and *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801?

3. Whether Rule 50(d) of the Federal Rules of Civil Procedure provides the Court of Appeals with any authority to direct the entry of judgment for respondents?"

---

## STATUTES INVOLVED

The statutory provisions involved are Section 2 of the Clayton Act, 38 Stat. 730 § 2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, § 1 (1936), 15 U.S.C. § 13 (1964), and Sections 3, 4, and 16 of the Clayton Act, 38 Stat. 731, §§ 3, 4, and 16 (1914), 15 U.S.C. §§ 14, 15 and 26 (1964); Section 7 of the Clayton Act, as amended, 38 Stat. 731, § 7 (1914), as amended 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964); Fed. R. Civ. P. 50, 308 U.S. 63 (1938); and Fed. R. Civ. P. 50 as amended Jan. 21, 1963, effective July 1, 1963; U.S. Const. amend. VII. These statutes are set out in Appendix C hereto.

## STATEMENT

This is a "primary line" price discrimination case brought by petitioner (hereinafter "Utah Pie") against three of its competitors (respondents "Continental," "Carnation" and "Pet")[1] (R. 16-20). Utah Pie had jury verdicts that respondents had individually violated Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, in their sales of frozen fruit pies in the Utah trading area, to the injury of Utah Pie in stated amounts (R. 41-42, 1405-1406).

After the verdicts, each respondent made a motion to set aside the verdict against it and to enter judgment n.o.v. in its favor in accordance with its previous motions for directed verdict, each motion was denied (R. 50-59, 1416, 1420) and the court entered the judgments and decree from which respondents appealed (R. 45-49, 59).

The United States Court of Appeals for the Tenth Circuit reversed all three judgments, and ordered entry of judgment for each respondent (R. 1526).

The grounds for the Court of Appeals' decision were that the evidence was insufficient, in each case, to support a jury finding that respondents' discriminatory low prices

---

[1]The jury failed to find that respondents had conspired to fix prices, and had agreed to try, by that means, to destroy petitioner's business in violation of Section 1 of the Sherman Act (R. 43, 47, 1406). Petitioner did not appeal that issue.

The jury did find that petitioner had violated Section 2 of the Clayton Act as amended by the Robinson-Patman Act, to the injury of respondent Continental in the amount of one dollar (R. 45, 1406). The trial court entered judgment for petitioner n.o.v., Continental appealed, and the Court of Appeals remanded with instructions to grant petitioner a new trial (R. 45, 62, 1508-1511).

These matters are not raised on this Petition.

for frozen pies in Utah Pie's trading area threatened competition or tended to create a monopoly. Specifically, the Court of Appeals said that none of the respondents ". . . by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that [respondent], by price differences or other acts, would do so in the future . . ." (R. 1502, 1504 and 1507; see also R. 1453).

Before reviewing the facts of these cases, the Court of Appeals stated its standard of review as follows:

> "Certain facts, if set out and considered in isolation, would present a distorted picture of these cases. To get a true perspective of them, the whole factual picture and the relation of each of the facts to each other must be brought into proper focus . . ." (R. 1453).

The Court of Appeals then proceeded to bring the facts of the case into what it considered to be the "proper focus," as set forth in its opinion (R. 1451; 349 F.2d 122).

The evidence relied upon by petitioner to sustain the verdicts showed the following facts:

**1. The Product Involved Is Frozen Fruit Pies.**

Utah Pie and respondents all manufactured and sold frozen fruit pies 8 inches in diameter and weighing from 20 to 24 ounces apiece (R. 103, 199, 216, 220, 509-510, 879, 1103). The weight differences are not readily apparent from inspection (R. 679-680, 879, 881, 1103, 1208).

The eight-inch frozen pies involved in this lawsuit are manufactured for ultimate resale, frozen, through food stores to consumers (R. 879-880). They are baked in the home (R. 969, 1012). The flavors of pies involved in this case are apple, cherry, boysenberry, blueberry, peach, pumpkin and mince (R. 67, 525).

The frozen pie industry is relatively young (R. 1010). Utah Pie entered the industry by freezing some of its pies, instead of baking them, in 1957 (R. 524). Respondents all entered the industry by way of acquisitions (R. 270, 271, 274, 391, 450). They acquired their pie plants at various times during the year 1955 (Ibid.). Growth of the industry has been rapid (R. 1053, 1220-1221, and see Pl. Ex. 62; R. 437, 2323; Pl. Ex. 61; R. 436, 503, 602, 2275).

Entry into the industry is easy, particularly for manufacturers such as Utah Pie, which already had pie-making facilities and a freezer locker (R. 524, 1011). There was testimony that there were over 200 pie manufacturers in the United States at the time of trial (R. 1011). Nevertheless, the evidence showed that the great bulk of the frozen pie business in the United States was in the hands of the three respondents, and one other manufacturer (Pl. Ex. 61; R. 436, 503, 602, 2275).

In support of its conclusions that the frozen pie business in Utah Pie's trading area was competitive, and was likely to remain so, the Court of Appeals noted that over thirty brands of frozen pies were sold in the States of Washington, Oregon, Utah, Arizona and Colorado (R. 1456). However, as Pet's exhibit A-27 (R. 893, 5824) shows, respondents were able to identify only nineteen

brands advertised at retail in Salt Lake City at any time in the calendar years 1957 through 1961 (D. Ex. A-27; R. 893, 5824). Of these brands, nine were packed either by petitioner or respondents (Ibid.). Of the remaining ten identified brands, only four were advertised in both 1960 and 1961 (Ibid.). Utah Pie has the only pie plant actually located in the intermountain area (R. 175, 482-483, 1115-1116).

Dr. Anderson, respondents' economic expert identified, and respondents introduced in evidence, a study showing the southern Idaho and Salt Lake City sales by frozen pie manufacturers other than Utah Pie and respondents (D. Ex. A-35; R. 1065, 5827). The share of these "others", in percentage terms, dropped from about 18.7% in 1959 to about 12.8% in 1960, to about 8.2% in 1961 (D. Ex. A-35; R. 1065, 5827; Pl. Ex. 62; R. 437, 2323). 1961 sales of the "others" were actually lower, in absolute terms, than their sales in 1960, despite a rapidly expanding market (Ibid.). Dr. Anderson identified 7 firms selling in 1958 and 1959, 9 firms selling in 1960, 8 selling in 1961 (R. 1081).

**2. Petitioner Was a Small Family Enterprise With Long Experience in the Pie Business.**

Petitioner Utah Pie Company is a Utah corporation owned by the Rigby family of Salt Lake City (R. 505-506). At the time of trial it had been in business for some 30 years, making fresh baked pies which it sold in Utah, Nevada, Colorado, New Mexico and Wyoming (R. 524, 808). At the time of trial, most of the operation of the business was in the hands of the younger generation of Rigbys—four young men, all of whom had

started working in the plant part time when they were in grade school (R. 475, 482, 505-506, 522). Of the 18 employees in the plant, 9 were members of the Rigby family (R. 506).

In about August of 1957, Utah Pie began freezing pies as well as baking them (R. 524). In the ensuing four fiscal years, it sold frozen pies in the states of Utah, Idaho, Nevada, Wyoming, Montana, Colorado, California, Oregon and Washington (Pl. Ex. 82; R. 527, 3616). At the time of trial, substantially all of Utah Pie's business was in pies, and mostly frozen pies (D. Ex. A-46; R. 997, 5850).

In September 1958, Utah Pie opened a new pie plant (R. 695). It was a well-managed plant with an advantageous location (R. 175). A quality control man for Safeway Stores, who inspected the plant, said that the production machinery was satisfactory and that the plant was the cleanest he had ever been in (R. 497).

Utah Pie's product throughout the period in controversy was a 24 ounce, 8 inch diameter, frozen fruit pie in the flavors apple, cherry, boysenberry, blueberry, pumpkin, mince (R. 67, 525, 879). A peach flavor was added in August 1960 (Pl. Ex. 4, R. 67, 1530). Petitioner's original brand was "Utah Pie" (R. 808). Later, it added "Frost 'N Flame," which was a "controlled label" in Utah and Idaho but which was Utah Pie's brand elsewhere, including Denver (R. 553-554, 780). Petitioner also packed "Sonny Boy" private label for Roundup Grocers in Spokane, Washington, a "Mayfresh" private label[3] for

[3]The Court of Appeals refers to Mayfresh as a "controlled" label (R. 1486). It was not—it was owned by the customer, not Utah Pie (R. 729).

American Food Stores in Ogden, Utah, and some seasonal pumpkin and mince pies under the private "Bel Air" label for Safeway (R. 516-517, 544, 729, 769, 814-818).

The quality and efficiency of petitioner's operation was attested to by the general manager of Pet's Frozen Foods Division (and Pet's "industrial spy") who appeared and testified, as a technical man, that inadequacies in Utah Pie's methods could all be very easily remedied in the event that Utah Pie secured an order from Safeway (R. 936-937). Respondents' brokers and salesmen testified that petitioner's pies were of high quality (R. 175, 971). Utah Pie's witnesses testified to Utah Pie's methods, capacity and quality control (R. 476-477, 486, 505-506, 524, 568) and underwent thorough cross-examination (R. 492-499, 512-514).

**3. Utah Pie Marketed Frozen Pies in Nine Western States.**

Before it added its line of frozen pies in 1957, Utah Pie was selling fresh-baked pies in the states of Utah, Nevada, Colorado, New Mexico and Wyoming (R. 524). During the four years preceding the filing of the complaint in this action, Utah Pie sold frozen fruit pies in the states of Utah, Idaho, Nevada, Wyoming, Montana, Colorado, California, Oregon and Washington (Pl. Ex. 82, R. 527, 3616; Pl. Ex. 91; R. 551, 4420). Utah Pie had brokers in Denver (R. 531) and Portland (R. 778).

Dr. Anderson, the Utah State Professor retained by the respondents jointly as an economics expert (R. 1059, 1087), testified that Washington, Oregon, Montana, Wyoming and Denver, Colorado, were within the "relevant market" of Utah Pie's business (R. 1115-1116). Pies

sold to wholesalers in Salt Lake City were resold in Idaho, Oregon, Nevada and Wyoming, as well as in Utah (R. 528-529).

Throughout the trial, evidence of Utah Pie's sales efforts in neighboring states and their relative success or failure came in through a variety of witnesses and documents. Places repeatedly referred to include Denver (R. 531-537, 539-540, 546, 564-565, 575, 583, 591-592), Spokane (R. 538-539, 575); Seattle (R. 538-539, 575); Portland (R. 538, 542, 575) and California (R. 540-541, 576).

Continental called one Doil Smith as a witness to testify specifically to Utah Pie's sales in Denver and general market conditions there (R. 742-761).

The Court of Appeals minimized Utah Pie's sales outside of the states of Utah and Idaho:

> ". . . its sales outside of Utah and southern Idaho during the period involved in this lawsuit, 1958 to 1961, were negligible. See Appendix I attached hereto." (Opinion, R. 1458).

But Appendix I to the Court of Appeals' opinion was limited to the *apple* flavor; the evidence shows that Utah Pie made the following proportions of its all-flavor sales outside of Utah and Idaho in the years in issue:

1958— 2.0%
1959—10.3%
1960—22.2%
1961—13.8%

(Source: Pl. Ex. 82; R. 527, 3616)

**4. There Was Evidence That Advertising Allowances Are Not Price Cuts.**

Respondents all offered certain inducements to encourage customers to buy. One such inducement was an "off the face" or "off invoice" price cut, showing a reduction from list price on the face of the invoice sent to the customer (R. 110-112, 462, 1030-1031). Another type of inducement was an "advertising allowance" which did not reduce the invoice price which the customer was obliged to pay, but did entitle him to a payment upon proof that he had advertised the respondent's product (R. 110-112, 158-159, 687-689, 697, 985).

In order to obtain the advertising allowance, a customer was not only required to advertise by brand name, but also to put in a claim for allowance—which was not necessarily done, in all instances (R. 158-160, 689, 697, 1095). Where a manufacturer offers an advertising allowance it gets consideration which it does not get for an ordinary price cut—advertising of *its brand* (R. 697, 985, 1030).

Officers of Continental, Carnation and Pet all testified that advertising allowances are *not* price cuts (R. 110-112, 160, 462, 687-689, 1030). Carnation often used both an advertising allowance and an off-invoice price cut simultaneously in Salt Lake (Pl. Ex. 129; R. 1224, 5348, 5349, 5351, 5353).

The Court of Appeals nevertheless held:

> "In effect, the advertising allowance is a discount, and fixes the net per case price of the pies purchased." (R. 1461).

The Court of Appeals prepared certain charts and tables of prices purporting to show minimal discrimination in respondents' prices (R. 1515-1521, 1523-1525). The tables are based upon the assumption that price cuts and advertising allowances *are* the same (R. 1461, 1467, 1485, 1488).

When respondents' pricing practices are examined in the light of the testimony that advertising allowances are *not* price cuts, a different pattern emerges. As will appear hereinafter, Utah Pie's price comparisons do *not* correspond to those of the Court of Appeals, since Utah Pie relied upon the evidence that advertising allowances are *not* discounts, while the Court of Appeals rejected it.

**5. Respondents Were All Enormous Conglomerate Corporations With Vast Financial Resources.**

Respondents are all corporations with annual sales in the hundreds of millions of dollars and profit in the millions or tens of millions of dollars (Pl. Ex. 31; R. 256, 2202). Frozen fruit pies were a minor portion of each respondent's business (Pl. Ex. 21; R. 235, 2161, 2163; Pl. Ex. 22; R. 241, 2167, 2168; Pl. Ex. 23; R. 245, 2175, 2176, 2177; Pl. Ex. 26; R. 378, 2180; Pl. Ex. 31; R. 256, 2202). Respondents were three of the four largest sellers of frozen pies in the nation. (Pl. Ex. 61; R. 504, 603, 2275, 2294).

Compared to respondents, Utah Pie was lilliputian (Pl. Ex. 92; R. 551, 4586; D. Ex. A-46; R. 997, 5847, 5848). For its fiscal year ending October 31, 1961, Utah Pie showed record frozen pie sales of $407,841.25 (Pl. Ex. 92; R. 551, 4586). However, Utah Pie's assets hit their pre-

complaint high point of $284,334.34 in the previous fiscal year (D. Ex. A-46; R. 997, 5847).

6. Utah Pie's Case Against Pet.

Pet got into the frozen pie business by acquiring the Crystal Canning Co., which had previously acquired the Petritz Pie Co., which had a plant in Michigan (R. 391, 1009-1010). Pet subsequently acquired additional plants in Fresno, California and Chambersburg, Pennsylvania (R. 1009-1110).

Pet's total net sales of all products increased in every full fiscal year covered by the damage period of the case (Pl. Ex. 31; R. 256, 2202). Its smallest overall sales in any of those years was $181,847,999 (Ibid.). Its smallest net profit before taxes in any of those years was in excess of $7 million (Ibid.). However, Pet consistently lost money on frozen pies throughout the damage period of this case (Pl. Ex. 21; R. 235, 234-236, 2161, 2163-2164). Pet consistently sold at a loss in the Salt Lake area (Pl. Ex. 27; R. 251, 2181).

Pet's high-priced proprietary pie label is "Pet-Ritz" (R. 1024). Pet's losses on Pet-Ritz in its Salt Lake division were greater than its losses elsewhere in 1958 and 1959; information for later periods was not available (Pl. Ex. 21; R. 235, 234-236, 2161, 2163-2164).

Pet always planned losses on its frozen pie business for Utah (R. 397, 400-401; Pl. Exs. 7, 7A, 7B; R. 409, 1926, 2047, 2048).

The tax aspect of losses in one part of a large and generally profitable operation is seen in the profit-and-loss statements of Pet's Frozen Foods Division. Until

January of 1960, they generally showed the "pre-tax profit or (loss)" (Pl. Ex. 7; R. 409, 1928-1998, *passim*). Thereafter, they show "net" loss—the operating losses reduced in proportion to their value as tax deductions (Pl. Ex. 7; R. 409, 1999-2045, *passim*).

Pet's marketing efforts in Salt Lake City (to say nothing of the rest of Utah Pie's trading area) were markedly successful, volume-wise, if not profit-wise. In 1958, Pet had 16.4% of the total Salt Lake market (Pl. Ex. 62; R. 437, 2323). In 1961, Pet had 29.4% of the total Salt Lake market, although its nearest plant was hundreds of miles away (Ibid.). In the year 1959, Pet sold more frozen fruit pies in Salt Lake than any other seller, and had 35.5% of the total market (Ibid.). Pet's share of the advertised brand market (i.e. other than private labels) was even more pronounced; by 1961 Pet was easily the largest seller, with almost 38% of the market (Pl. Ex. 96; R. 581, 4592, 4593).

Pet also had the largest market share of the United States' "quality" frozen pie market in 1958 and 1959 (Pl. Ex. 61; R. 436, 504, 602, 2275).

After 1957, Pet's three pie plants in California, Michigan and Pennsylvania supplied the entire United States (R. 1010). Pet's pies were sold on a "delivered price" basis (R. 1028).

Pet's original "Pet-Ritz" product was an eight inch pie weighing 24 ounces (R. 1024). In 1959 Pet introduced its 20 ounce "Swiss Miss" pie which " . . . competes with . . . the economy pie factor of the market, and these generally are the regional pie brands . . ." (R. 1028).

Pet also packed "Bel Air" label pies for Safeway Stores under a requirements contract (Pl. Ex. 42; R. 1054, 2226). The Bel Air pie is "substantially the same product" as the Pet-Ritz pie (R. 405). Pet-Ritz pies and Bel Air pies were stipulated to be of "like grade and quality" (R. 1373). Pet's sales of Bel Air label pies began in 1959 and continued through to the date of the complaint (D. Ex. A-35; R. 1065, 5827, 5829-5832). The Safeway Bel Air business was highly important to Pet, amounting to 63,000 dozen pies (126,000 cases) in the immediate Salt Lake City area in the years 1959, 1960 and 1961 (Ibid.). Safeway was also the largest buying organization in Denver (R. 758-759).

**a. Pet's Price Discriminations.**

**(1) Overall Discriminations Shown by Annual Average Prices.**

On an overall average basis, Pet realized lower net prices in its Salt Lake Division in 1958 and 1959 than it did in the rest of its frozen pie business nationwide. As shown by Pl. Ex. 24 (R. 377, 2178), based upon Pet's internal documents, Pet's average net sales price per dozen frozen fruit pies in its Salt Lake Division was $4.30 as against an average net sales price of $4.46 per dozen for all other Pet divisions (R. 246-247). In 1959, Pet's Salt Lake pie prices were lower than its average prices everywhere else on a gross basis ($4.68 in Salt Lake vs. $4.71 all other divisions) as well as on a net basis ($3.91 in Salt Lake vs. $4.13 everywhere else) (Pl. Ex. 24; R. 377, 2178). Pet's sales volumes in both 1958 and 1959 were impressive in Salt Lake ($469,267; $554,152) as well as in the other Pet Divisions ($5,782,649; $7,124,271) (Ibid.).

In 1960 and 1961, Pet's Pet-Ritz sales prices were also lower in Salt Lake than they were on an overall basis (Pl. Ex. 25; R. 378, 2179, 2180). Pet-Ritz average prices, gross and net, per dozen for those years were as follows:

| | Salt Lake Price | Total Sales Price | Difference |
|---|---|---|---|
| | 1960 | | |
| gross | $4.56 | $4.92 | $.36 |
| net | $3.69 | $4.19 | $.50 |
| | 1961 | | |
| gross | $4.57 | $4.97 | $.40 |
| net | $3.98 | $4.24 | $.26 |

(Source: Pl. Ex. 25; R. 378, 2179)

(ii) Pet-Ritz/Bel Air Discriminations.

At all times, Pet maintained a two-price system by which it sold "Bel Air" label pies to Safeway at prices substantially below the prices of "Pet-Ritz" pies of like grade and quality (Pl. Ex. 42; R. 1041, 1054, 2226; Pl. Ex. 43; R. 406, 2243; Pl. Ex. 44; R. 407, 2247, 2248; R. 405, 1373).

The price differences between Pet-Ritz and Bel Air ranged as high as $.77 per case of 6 ($1.54 per dozen) in Utah Pie's trading area (Pl. Ex. 42; R. 1054, 2226, 2240).

Comparing the price which Pet was charging in *Northern California* for its Pet-Ritz pie with the price it was charging Safeway for Bel Air pies for *Salt Lake*, the following discriminations appear on the face of Pet's Safeway contract:

| Flavor | Price Difference |
|---|---|
| Apple | $.67 per case |
| Cherry | .72 |
| Peach | .54 |
| Boysenberry | .66 |
| Pumpkin | .61 |
| Mince | .33 |

(Source: Pl. Ex. 42; R. 1041, 1054, 2226, 2240)

The head of Pet's Milk Products Division, very closely associated with the problems of the frozen pie business (R. 1009) was unable to explain why Pet's basic Pet-Ritz price discussed with Safeway was lower in Salt Lake than in California (R. 1054). Pet's Controller could not explain it, either (R. 404).

Using Pet's invoices as a source of California prices and Pet's own D. Ex. A-35 (R. 1065, 5827, 5837-5838, 5844) as a source of Salt Lake City prices, it is possible to show prevailing patterns of discrimination between Pet's California prices for Pet-Ritz and contemporaneous sales of pies of "like grade and quality" (both Bel Air and Pet-Ritz; R. 1373). The relevant invoices may be found in Pl. Exs. 116-122 (R. 993, 996, 4836, 4947, 5034, 5098, 5230, 5250, 5318).

Tables showing Pet's price discriminations revealed in the above sources are contained in Appendix B to this brief.

Those tables show sales of Pet-Ritz apple and cherry pies in California in substantially every month from July, 1959, through May, 1961. They show sales of Pet-Ritz *apple* pies at lower prices in Salt Lake in 19 out of 20

months for which the record contains evidence of a sale of a Pet-Ritz apple pie in California. They show sales of Bel Air apple pies in Salt Lake at still lower prices for 18 out of 18 months for which the record shows both sales of Pet-Ritz in California and sales of Bel Air in Salt Lake.

Those tables show sales of Pet-Ritz *cherry* pies in Salt Lake at prices lower than sales in California in 18 out of 20 months for which the record contains evidence of a sale of a Pet-Ritz cherry pie in California. They show sales of Bel Air cherry in Salt Lake at still lower prices for 18 out of 18 months for which the record shows sales of Pet-Ritz in California and also of Bel Air in Salt Lake.

The Court of Appeals ignored the discriminations between Pet's San Francisco prices for Pet-Ritz and its Salt Lake prices for Bel Air, except to note that ". . . Pet's costs of manufacture, sale and delivery of [Bel Air] pies were $0.4980 less than such costs of like pies sold under its regular labels, and that the difference in price to Safeway of such Bel-air pies and the price which such like pies sold to other customers was only $0.4275. The difference in cost justified the difference in price under the cost justification proviso in 2(a) of the Clayton Act. . . ." (R. 1465, 1501).

In fact, the only documentary evidence of a cost justification for Pet's price differences other than the Safeway contract itself (Pl. Ex. 42; R. 1041, 1054, 2226) covered only the last five months prior to the filing of the complaint (Pl. Ex. 43; R. 406, 2243; Pl. Ex. 44; R. 407,

2247). These computations are broad averages of prices and costs over a large area and all flavors of pies (Ibid). They purport to justify a price difference of no more than $.4980 per case, although the price differences often exceeded that figure by substantial amounts. (See table above).

The Court of Appeals' other reason for neglecting the impact of Pet's Bel Air sales in Utah Pie's trading area was ". . . because it was clearly established by uncontradicted and uncontroverted evidence that Safeway was not willing in those years 1959, 1960 and 1961 to purchase frozen fruit pies from Utah Pie, for the reason that it was unable to persuade Utah Pie to install means and procedures that would insure uniform quality of Bel Air frozen fruit pies produced by Utah Pie and sold by it to Safeway" (R. 1472, 1501).

However, Gaylen Rigby, Utah Pie's sales manager, testified directly that Safeway not only *was* willing to purchase a general line of Bel Air flavors for its Salt Lake and Denver divisions from Utah Pie, but that he bought a year's supply of fruit in reliance upon the Safeway buyer's recommendation that he do so (R. 549).

Ross Rigby, Utah Pie's plant engineer, testified at length to the effect that Utah Pie's quality control did, in fact, satisfy Safeway on the pumpkin and mince pies which Utah Pie packed under the Bel Air label (R. 492-493, 497). He testified that a set of closing plows required to pack pies in Safeway's Bel Air boxes would have cost $1400 and would have taken about 8 hours to install (R. 486).

Pet got all of the Safeway Bel Air business except a portion of the seasonal pumpkin and mince pie business (R. 1138). Pet's exclusive contract with Safeway precluded Utah Pie from competing for the general line of Bel Air business in Salt Lake and Denver where it had the advantages of convenient location and low labor costs (Pl. Ex. 38; R. 386, 2212). There were "very few points where they [Utah Pie] would have a problem" with Safeway (Pl. Ex. 38; R. 386, 2212, 2214; 932, 936).

Safeway's Bel Air pie sold in large quantities in Salt Lake (D. Ex. A-35; R. 1065, 5827, 5830-5832). It sold at retail at a comparatively low price (D. Ex. A-35; R. 1065, 5827, 5835-5844). The low pricing structure of the Bel Air pie produced by Pet probably had a depressing effect on the prices of frozen pies in all markets where Safeway was a competitive factor (R. 695, 715, 720, 724, 751, 815).

Safeway Divisions did not limit their purchases to Safeway's own Bel Air brand—they purchased "Utah Pie" brand pies, and the brands of the other respondents, from time to time (R. 544, 698, 707, 1027, 1138). If the Safeway Divisions wish to stock "Bel Air", they must obtain it through Safeway's buyer, not directly from the manufacturer, but they are not obligated to stock "Bel Air" if they don't want to, and sometimes do not do so (R. 704-705; 1027, 1138).

Although it thus appeared that there was direct competition between Bel Air *and other brands* for the custom of the Safeway Divisions, the Court of Appeals held, with respect to Pet's sales of Bel Air pies in 1959, 1960 and 1961:

"Those sales afford no support for Utah Pie's 2(a) claims . . .' (R. 1501).

(iii) Pet-Ritz/Pet-Ritz Discriminations.

The Court of Appeals acknowledges Pet-Ritz/Pet-Ritz price differences but attempts to minimize them as "almost inconsequential" in volume with a chart limited to *apple* flavor (R. 1470). In fact Pet sold over 35,000 dozen (70,000 cases) of Pet-Ritz pies in the immediate Salt Lake area from 1958 to 1961 (D. Ex. A-35; R. 1065, 5827, 5829-5832). In addition to the evidence that Pet's discriminatory prices may have diverted substantial business to Pet, there was evidence that a general reduction of the price structure in Utah Pie's trading area hurt Utah Pie on the sales which it *did make* (Pl. Ex. 4; R. 67, 1530; Pl. Ex. 3; R. 552, 4587; Pl. Ex. 100; R. 585, 4604).

In its analysis of Pet's pricing practices, the Court of Appeals relied in part on Pl. Ex. 112 (R. 4713) (See R. 1467). That exhibit was identified as the underlying work papers for some of respondents' exhibits (R. 627-628).

It should be considered in the light of the evidence which shows that an "off invoice" allowance is a price cut, whereas an "advertising allowance" is *not* (R. 110-112, 160, 462, 689, 1030). The Court of Appeals expressly took the opposite view in considering Pl. Ex. 112: "By lowest absolute price is meant the list price, less any deals offered, whether direct discounts from the invoice price or advertising allowances" (R. 1467). The Court of Appeals has thus relied upon the right-hand column of Pl. Ex. 112 headed "absolute price" (R. 4713, 4714-4765) rather than the center column headed "invoice net price."

Treating "invoice net price" as the proper price upon which to base a comparison, the pattern of Pet-Ritz/Pet-Ritz price differences between Northern California and Utah Pie's trading area in 1960 and the pre-complaint portion of 1961 emerges (Pl. Ex. 112; R. 4713; compare on apple prices R. 4770-4771 with R. 4774, 4775, 4776, 4779, 4780 and 4782; compare on cherry prices R. 4783-4784 with 4787-4791, 4792, 4793 and 4795; compare on boysenberry prices R. 4796-4797 with R. 4801, 4802, 4804, 4807 and 4808; compare on peach prices R. 4822-4823 with R. 4826, 4827, 4828, 4829, 4831, 4832 and 4834).

Despite the freight of about $.30-$.35 (R. 254, 663) from California to Salt Lake, Pet's "net invoice" prices for Pet-Ritz apple, cherry, boysenberry and peach were equal to or lower than Pet's prices in Northern California during 1960 and 1961 (Pl. Ex. 112; R. 627, 629, 4713; per comparable price sheets, *supra*). Whenever there was a discrimination, the low price was in Utah Pie's trading area (Ibid.).

The following table shows the Pet-Ritz "invoice net" pricing pattern for apple in 1960 and the first 8 months of 1961:

Comparison of Pet-Ritz Apple Pie Prices in Northern California and States in Plaintiff's Trading Area

| | | No. of Months in Which Pet-Ritz Carried Lower Invoice Net Price in Plaintiff's Trading Area | No. of Months in Which Pet-Ritz Carried Higher Invoice Net Price in Plaintiff's Trading Area |
|---|---|---|---|
| Colorado | 1960 (R. 4770-4771, 4774) | 6 | 0 |
| | 1961* | 8 | 0 |
| Wyoming | 1960 (R. 4770-4771, 4782) | 6 | 0 |
| | 1961* | 4 | 0 |
| Utah | 1960 (R. 4770-4771, 4779) | 3 | 0 |
| | 1961* | 4 | 0 |
| Idaho | 1960 (R. 4770-4771, 4775) | 3 | 0 |
| | 1961* | 4 | 0 |
| Montana | 1960 (R. 4770-4771, 4776) | 3 | 0 |
| | 1961* | 4 | 0 |

(*8 months prior to complaint in this action). (Pl. Ex. 112; R. 627, 629, 4713)

The pattern on cherry pies, the second largest selling flavor (D. Ex. A-35; R. 1965, 5827, 5828), was almost the same as for apple (Pl. Ex. 112; R. 627, 629, 4713, 4783-4784, 4787-90, 4792, 4793 and 4795). The exception was the State of Wyoming, in which there was a discriminatory low price in every one of the eight relevant months of 1961 (Ibid.). At no time in 1960 or in the relevant eight months of 1961 was the price of Pet-Ritz cherry lower in Northern California, near the plant, than it was where plaintiff was doing business (Ibid.). A similar pattern of discriminatory price differentials, with some variations, prevailed with respect to the other Pet-Ritz flavors (Ibid.)

(iv) Swiss Miss/Swiss Miss Discriminations.

Prior to the filing of the complaint in this case in September, 1961, Pet's Swiss Miss apple and cherry pies consistently sold at $3.25 per dozen invoice net price in Salt Lake as against $3.17 in Northern California and Reno, Nevada (Pl. Ex. 112; R. 627, 629, 4712; see R. 4715, 4717, 4722, 4723). There was thus no actual "discrimination", as Utah Pie calculates it, although the price difference of $.08 per dozen was substantially less than the freight of $.30 to $.35 per dozen from Pet's plant in California to Salt Lake (R. 254, 663).

But Swiss Miss did sell at prices below the Northern California and Nevada price in other parts of Utah Pie's trading area on a delivered invoice net price basis. While apple and cherry were sold at $3.17, invoice net price in Northern California (Pl. Ex. 112; R. 627, 629, 4712, 4715, 4722) they were selling substantially below $3.17 for extended periods in parts of Idaho (Ibid., R. 4716, 4730), Wyoming (Ibid., R. 4719, 4725) and Colorado (Ibid., R. 4720, 4724).

b. There Was Evidence of Pet's Predatory Tactics in Its Dealings in Petitioner's Trading Area.

(i) "Investment Spending".

Pet engaged in a program of intentional, prolonged below-cost sales of frozen pies, financed with money "borrowed . . . from our total corporate operation" (R. 1019, 1050-1051). This practice was referred to as "investment spending" (R. 400-401, 1018-1019).

There was evidence that Pet's "investment spending" program was aimed at petitioner; a memorandum written

by Pet's intermountain area sales manager stated, under "Unfavorable Factors Affecting Results", that "despite our steady growth generally there are factors at work that dig holes in our operation. Utah Pies in the Salt Lake District are a constant 'check' on our growth." (Pl. Ex. 37; R. 385, 2210).

(ii) Industrial Espionage.

Pet also engaged in industrial espionage of petitioner's plant. At a crucial moment in the negotiations for Safeway's Bel Air business, Schenk, the General Manager of Pet's Frozen Foods Division inspected petitioner's plant under false pretenses and prepared a report on his findings (R. 928-949; Pl. Ex. 38; R. 386, 2212-2214). The report was addressed to Dittman, contract sales manager for Pet (Pl. Ex. 38; R. 386, 2212; R. 950, 957-958). The report was to be used by Dittman in disparaging petitioner to Safeway (R. 934-935). Copies of the report were circulated to L. G. Leutwiler, vice-president of production of Pet's Milk Products Division; Gordon Ellis, President of Pet's Milk Products Division and S. P. Harter, Pet's Senior Vice-President (R. 933; Pl. Ex. 38; R. 386, 2212).

Subsequently, Pet got the Safeway business (at a discriminatory price) and petitioner lost out (R. 549-550; Pl. Ex. 42; R. 1054, 2226). Gaylen Rigby, Utah Pie's sales manager testified that he had actually been promised some Safeway Bel Air business two days after Schenk's clandestine visit to petitioner's plant (R. 547-549). Young, the Safeway buyer denied that he had ever promised to give petitioner the Bel Air business, and explained that he was dissatisfied with petitioner's quality control (R. 1139, 1160).

Young, the Safeway buyer, also denied that any representative of respondent Pet had ever talked to him about conditions within petitioner's plant (R. 1137). However, "lack of technical quality control personnel" was one of the "points you might use" listed in Pet's espionage memorandum compiled for its Safeway contractor negotiator (Pl. Ex. 38; R. 386, 2212, 2214). And this point was raised by Safeway in its dealings with Utah Pie (R. 492).

On the other hand there was testimony (not objected to) that a Safeway quality control man who had inspected petitioner's plant had said that it was the cleanest he had ever been in (R. 497). Young then testified that the Safeway quality control inspector was "not qualified" to make the inspection (R. 1157-1158).

Although Young, the Safeway buyer, was not employed by a party, there was evidence that his interest might be greater than appeared at first blush. A Pet internal memorandum (Pl. Ex. 47; R. 412, 2252-2253), said in part ". . . Young will act as a door opener for our sales people. . . ." The memo went on to say ". . . Young will encourage the Safeway Sales Division to stock Pet-Ritz flavors of 8" fruit pies that are packed under the Bel Air label, particularly with those divisions that are currently stocking a pie that competes with Pet-Ritz, both in quality and price. Young will send me a blind copy of the letter that goes to each Safeway Division, with the understanding our men are not to quote this letter." (Pl. Ex. 47; R. 412, 2252, 2253-2254).

William Harsha, President of Pet's Milk Products Division, identified Pl. Ex. 47 as a "memorandum which I wrote to myself . . ." (R. 1024). It was a "reminder for my own personal use . . ." (R. 1024, 1035). But when Harsha was asked if his own memorandum spoke the truth, he equivocated—"agreed" meant "agreed" in one place, but not in another; there was no discussion about a "blind copy" with Young; there was no agreement or understanding that the Pet men were "not to quote" the letter of which Pet was to receive a blind copy (R. 1036-1040).

Young testified flatly that Gaylen Rigby's testimony to the effect that Young had told him to buy fruit for Bel Air pies was "false" (R. 1139). He also testified that statements in Harsha's memorandum were "not true" (R. 1144).

David Dittman, Administrative Manager of Pet's Frozen Food Division, also testified (R. 950 et seq.). He said that he did not discuss Schenk's espionage report (Pl. Ex. 38) with Schenk although he asked Schenk to obtain the information (R. 957-958). He further testified that he "never used any of those points" which Schenk had suggested he "might use" with Safeway (R. 959; Pl. Ex. 38; R. 386, 2212, 2214).

Counsel for Utah Pie specifically raised the question of Harsha's, Dittman's and Young's veracity in argument to the jury (R. 1255-1262).

Counsel for Pet also recognized that credibility of witnesses was a major issue in the case when he began his summation:

"Mr. Lamb: May it please the Court, ladies and gentlemen of the jury:

"In my entire 30 years of law practice, I have never had one of my witnesses accused of being a liar. Three of my witnesses were accused by the opposition of being a liar—the head buyer for the Safeway Stores, the president of the Milk Products Division of Pet Milk Company, Mr. Dittman, chief contract officer for the Pet Milk Company . . ." (R. 1310).

Faced with these open conflicts in the evidence, the Court of Appeals said that the evidence was "free from substantial dispute, except for a few statements of opinions or conclusions not based on any substantial underlying proof" (R. 1454) and went on to rely specifically upon the testimony of Dittman and Young (R. 1475-1476):

"Of course, Pet's conduct was reprehensible and is not to be condoned. However, the information contained in Dittman's report was never conveyed to Safeway personnel. Dittman so testified, and so did Young, Safeway's buyer. It thus appears that the Dittman report was never used by Pet in its competitive efforts with Utah Pie" (R. 1475-1476).

(iii) The Swiss Miss Fighting Brand.

Another predatory tactic which the evidence showed Pet had employed was its "fighting brand", Swiss Miss.

The Swiss Miss Pie was 4 ounces lighter than the Pet-Ritz and Bel Air brands, and sold at substantially lower prices (D. Ex. A-35; R. 1065, 5827, 5837-5838,

5843). However, the public ordinarily can't tell the difference between various weights of 8 inch pies (R. 879-880, 1103). The purpose of the Swiss Miss was to ". . . meet price competition without endangering the consumer concept of Pet-Rifz quality" (Pl. Ex. 61; R. 436, 602, 2275, 2276). The "price competition" which Pet had in mind was ". . . the economy pie factor of the market, and these generally are the regional pie brands . . ." (R. 1028, 1056). Although Pet-Ritz had larger sales volume than Swiss Miss nationally (Pl. Ex. 21; R. 235, 2161, 2165) Swiss Miss outsold Pet-Ritz almost 13 to 1 in Salt Lake in 1961 (Pl. Ex. 62; R. 437, 2323).

**(iv) Discriminations Themselves as Evidence of Intent.**

As Dr. Anderson, respondents' economics expert, put it, Pet's lower prices at points more distant from its plant were "unnatural" (R. 1130). They were evidence of predatory pricing as "one of the possibilities". (R. 1115).

**(v) Pet's Safeway Contract Was Anticompetitive.**

Although both Pet's Harsha and Safeway's Young denied that Pet's Bel Air contract was a "requirements" contract (R. 1040, 1148) it showed on its face that it was for a minimum of 1,000,000 cases in 1960 (Pl. Ex. 42; R. 1041, 1054, 2226, 2228). Pet's requirements of pies were shown as almost 2,000,000 cases in an appendix to the contract (R. 2236). The contract stated "Seller agrees to manufacture and pack in accordance with such estimates . . ." (R. 2226). There was evidence that Pet had

deleted from a draft of the contract a provision which read "If seller is unable to deliver the 2,000,000 case quantity, buyer shall have the right to procure supplies from other packers in the amounts seller is unable to deliver" (Pl. Ex. 42; R. 1041, 1054, 2226, 2238). In fact, with the exception of pumpkin and mince pies, Safeway never purchased Bel Air from any supplier other than Pet during the life of the contract (R. 1150).

Dr. Anderson agreed that if it turned out to be a fact that the Pet-Safeway contract for Bel Air pies was a total requirements contract, that would be a highly anti-competitive fact (R. 1124-1125).

**7. Petitioner's Case Against Carnation.**

Carnation entered the frozen pie business by acquiring "Mrs. Lee's Pies" in 1955 (R. 450). With that purchase, Carnation acquired the "Simple Simon" label and two plants, one of which became Carnation's Torrance plant (R. 1202). Carnation's 8-inch frozen fruit pies were the same 24 ounce weight as Utah Pie's (R. 1208).

Carnation had total sales of over $378,000,000 in 1958 (Pl. Ex. 31; R. 256, 2202). Its total sales increased in every year from 1958 to 1961 (Ibid.). Its smallest net profit before taxes in any of the years 1958-1960 was in excess of $18,000,000 (Ibid.). However, in the Pacific Northwest and Mountain States, where it competed with Utah Pie, Carnation's Frozen Foods Division had net losses (on all frozen products, including pies) before taxes in 1959, 1960 and 1961 (Ibid.). The figures for 1958 were not available (Ibid.).

Carnation pricing was on a delivered basis, by zones; it did not offer pies on an f.o.b. plant basis (R. 451, 453). Carnation did not maintain the same price within its price zones; its price within zones varied because of the "competitive situation" (R. 1173).

**a. Carnation's Price Discriminations.[3]**

During the damage period of this case, Carnation consistently charged lower prices in plaintiff's trading area than the prices which it was charging in Northern California, an area of stable prices and consistent profits. (The exhibits showing Carnation's prices are Pl. Exs. 64, 65, 66 (R. 454, 2331, 2368 and 2402) and Carnation's Exs. C-B, C-C, C-D, C-E, and C-F (R. 470, 5722-5766).)

In order to get its pies from Los Angeles to Salt Lake, Carnation had transportation expense of $.35 per dozen, plus $.02 per dozen in spoilage (Pl. Ex. 28; R. 261, 2184, 2185).

However, in calculating Carnation's price discriminations, Utah Pie has disregarded transportation and spoilage *expenses* absorbed by Carnation and has simply compared Carnation's actual *prices* as shown on its price

---

[3]The Court of Appeals stated that Utah Pie's "claim against Carnation was tried on the theory of low prices in the Salt Lake City market and high prices in the Los Angeles market, at which Carnation sold its frozen pies" (R. 1484).

In fact, proof was not limited to any such pattern of Carnation's price discriminations and the verdict found discrimination between prices Carnation charged "• • • in the Utah trading area and the prices which it has charged for frozen pies *elsewhere* • • •" (R. 1406; emphasis added).

lists and as reduced by "off the face of the invoice" price-reducing deals.[4]

The true nature of Carnation's discriminations in all flavors, based on the evidence that "off the face" price reductions are price cuts but that "advertising allowances" are not, is shown by the following table:

---

[4]Carnation published price lists by zones. The actual prices paid by Carnation's customers in petitioner's trading area, however, were often reduced by "off the face" deals—price cuts which showed on the face of the invoices (R. 459-460). Carnation also offered "advertising allowances" which, according to the Merchandise Manager of Carnation's Frozen Foods Division were *not* price cuts (R. 461-462).

The Court of Appeals prepared a chart (Appendix VII to its opinion) which purports to set forth Carnation's "absolute price" for apple flavor in various places. It defined "absolute price" as follows:

> "By 'absolute price' is meant the list price, less any deals offered, *whether direct discounts from invoices or allowances for advertising.*" (R. 1488; see also R. 1467).

Even the Court of Appeals' Appendix VII, rejecting the evidence that advertising allowances are *not* price cuts, showed that Carnation's price for apple flavor was lower in Salt Lake than elsewhere for 8 out of 12 months of 1960 and 8 out of 8 pre-complaint months of 1961 (R. 1518, 1524).

## CARNATION'S ACTUAL PRICE DIFFERENCES BETWEEN NORTHERN CALIFORNIA AND SALT LAKE

(Lower Price in Utah)

| from | to | No. of days (inclusive) | Price difference (per case) | Flavor |
|---|---|---|---|---|
| **1959** | | | | |
| Nov. 12 | Dec. 31 | 50 | .10 | apple<br>cherry<br>peach |
| Nov. 12 | Dec. 31 | 50 | .40 | pumpkin<br>mince |
| Nov. 12 | Dec. 31 | 50 | .26 | boysenberry |
| **1960** | | | | |
| Jan. 1 | May 1 | 121 | .20* | pumpkin<br>mince |
| Mar. 7 | May 6 | 61 | .21 | apple<br>cherry<br>peach |
| May 9 | June 17 | 40 | .21 | apple<br>cherry |
| July 1 | July 31 | 31 | .12 | apple<br>cherry<br>peach |
| July 19 | July 31 | 13 | .12 | boysenberry |
| Aug. 1 | Sept. 30 | 61 | .18 | apple<br>cherry<br>peach<br>boysenberry |
| Oct. 1 | Oct. 11 | 11 | .20 | pumpkin |
| Oct. 3 | Nov. 11 | 40 | .18 | apple<br>cherry<br>peach<br>boysenberry |
| Oct. 12 | Jan. 15 ('61) | 80 | .39* | mince |
| Oct. 12 | Nov. 15 | 35 | .39 | pumpkin |
| Nov. 16 | Jan. 15 ('61) | 46 | .19* | pumpkin |
| Nov. 14 | Dec. 2 | 19 | .20 | apple<br>peach |
| Dec. 5 | Dec. 23 | 19 | .20 | apple<br>cherry |

| from | to | No. of days (inclusive) | Price difference (per case) | Flavor |
|---|---|---|---|---|
| 1961 | | | | |
| Jan. 1 - | Jan. 15 | 15 | .19* | pumpkin |
| | | | .39* | mince |
| Jan. 2 - | Jan. 11 | 10 | .18 | apple |
| | | | | cherry |
| | | | | peach |
| Jan. 11 - | Mar. 17 | 66 | .45 | apple |
| | | | | cherry |
| | | | | peach |
| Mar. 27 - | May 5 | 40 | .45 | apple |
| | | | | cherry |
| | | | | peach |
| | | | | boysenberry |
| May 8 - | June 2 | 26 | .45 | apple |
| | | | | cherry |
| | | | | peach |
| | | | | boysenberry |
| June 5 - | July 7 | 33 | .45 | apple |
| | | | | cherry |
| | | | | peach |
| | | | | boysenberry |
| July 10 - | Aug. 18 | 40 | .45 | apple |
| | | | | cherry |
| | | | | peach |
| Aug. 21 - | Sept. 29 | 40 | .38 | apple |
| | | | | cherry |
| | | | | peach |
| Aug. 21 - | Sept. 29 | 40 | .18* | pumpkin |
| | | | .18* | mince |

*List price difference. Compare R. 2348, 2349 with R. 2383; R. 2354, 2355 with R. 2391; R. 2361 with R. 2400.

(Sources:

Carnation's Northern California list prices are shown on its "Zone 1" price lists, Pl. Ex. 64; R. 454, 2331, et seq. The comparable price lists for Carnation's "Zone 2," which includes Washington, Oregon, Idaho, Utah and Montana are Pl. Ex. 65; R. 454, 2368, et seq. Price lists covering comparable time periods appear as follows:

| Price List No. | Effective Date | Zone 1 | Zone 2 |
|---|---|---|---|
| 12 | Nov. 3, 1959 | R. 2348 | R. 2383 |
| 12A | Feb. 1, 1960 | R. 2349 | —— |
| 13 | May 1, 1960 | R. 2350 | R. 2384 |
| 13A | July 19, 1960 | R. 2351 | R. 2386 |
| 13B | July 25, 1960 | —— | R. 2388 |
| 14 | Oct. 1, 1960 | R. 2352 | R. 2389 |
| 14A | Oct. 7, 1960 | R. 2354 | —— |
| 14A | Oct. 12, 1960 | —— | R. 2391 |
| 14A | Nov. 16, 1960 | R. 2355 | —— |
| 15 | Jan. 16, 1961 | R. 2358 | R. 2394 |
| 15A | Feb. 6, 1961 | R. 2359 | —— |
| 16-16A | Apr. 17, 1961 | R. 2360 | R. 2396 |
| 16B | May 8, 1961 | —— | R. 2398 |
| 17 | Aug. 21, 1961 | R. 2361 | R. 2400 |

The Northern California "deals" are summarized in D. Ex. C-E; R. 470, 5748. The last "off the face" ("O.F") price cut in that area (i.e. reduction of Zone 1 price) ended December 31, 1958 R. 5751. But "off the face" price reductions from the Zone 2 price lists in Sale Lake were a regular occurrence through 1961 D. Ex. C-F; R. 470, 5760-5766. Carnation also had substantial "off the face" reductions from Zone 2 prices in Spokane, often coupled with "merchandising" allowances D. Ex. C-B; R. 470, 5722-5728).

Carnation's two largest selling flavors in Salt Lake were apple and cherry, in that order. (D. Ex. C-O; R. 1163, 5775; D. Ex. A-35; R. 1065, 5827, 5829-5832). The persistence of Carnation's discriminatory pricing, particularly in those two flavors, is shown by the following table:

NUMBER OF DAYS IN WHICH CARNATION'S ACTUAL PRICE IN SALT LAKE WAS BELOW ITS ACTUAL PRICE IN NORTHERN CALIFORNIA

| Flavor | Number of Days | | |
|---|---|---|---|
| | 1959 | 1960 | 1961* |
| Apple | 50 | 271 | 255 |
| Cherry | 50 | 252 | 255 |
| Peach | 50 | 212 | 255 |
| Boysenberry | 50 | 114 | 99 |
| Pumpkin | 50 | 213 | 55 |
| Mince | 50 | 201 | 55 |

*of 272 days prior to September 29, 1961.

The discriminations shown in the foregoing tables are largely the result of "off the face" ("O.F.") deals in Salt Lake (D. Ex. C-F; R. 470, 5760-5766). List prices were usually the same in Northern California and in Oregon, Washington, Idaho, Utah and Montana, particularly on the apple, cherry and peach flavors (see table of comparable price lists, *supra*). As previously shown, last "off the face" deal in Northern California was in 1958 (D. Ex. C-B; R. 470, 5722, 5751-5759). Consequently, the only time Carnation ever had a "natural" discrimination with the difference in price reflecting the difference in cost, was in the very rare instance in which the Salt Lake list price, less an "off the face" deal, if any, still exceeded the Northern California list price.

Carnation's price discriminations between Northern California and Salt Lake City were largely the result of local "off the face" reductions from Carnation's "Zone 2" price lists (Pl. Ex. 65; R. 454, 2368) not matched by any "off the face" price reductions from Carnation's

substantially identical base price list covering Northern California (Pl. Ex. 64; R. 454, 2331), as shown above (compare D. Ex. C-E; R. 470, 5748 with D. Ex. C-F; R. 470, 5760).

But in October, 1959, Carnation published a separate price list for Colorado (Pl. Ex. 65; R. 454, 2368, 2382). In May, 1960, it published a separate price list for Wyoming and Colorado in Zone 2A (Pl. Ex. 65; R. 454, 2368, 2385). Its July, 1960, price list diverged from the price list published on the same date for Oregon, Washington, Idaho, Utah and Montana (compare R. 2387 with R. 2388; Pl. Ex. 65; R. 454, 2368). Thereafter, the separate treatment of Colorado and Wyoming was maintained throughout the relevant period of this lawsuit (compare R. 2387 with R. 2390; R. 2391 with R. 2392; R. 2394 with R. 2395; R. 2396 with R. 2397; R. 2398 with R. 2399; R. 2400 with R. 2401, Ibid.). This resulted, at one point, in a discrimination in list price between Northern California (high) and Colorado and Wyoming (low) of $.58 per case on apple, peach and cherry pies (Ibid.). Since there were no price-reducing off-the-face "deals" in effect in Northern California at the time, the price lists alone showed a minimum discrimination of $.58 per case on those flavors.

**b. Carnation's Sales in All Markets.**

There can be no doubt that Carnation actually made sales at its various quoted prices throughout the portion of the United States in which it was offering frozen pies for sale. Pl. Ex. 6 (R. 449, 1829, et seq.) is a series of Carnation's "territorial profit and loss" statements,

which bear a monthly summary of sales volumes, by area, in the upper right-hand corner, broken down by type of product. They show consistent sales of 8" fruit pies in the thousands and tens of thousands of cases for substantially every month of 1959 through 1961, inclusive, in the Southern California area, the Northern California area and the Pacific Northwest and Mountain States area (Pl. Ex. 6; R. 449, 1829).

Carnation's sales in all areas were the subject of extensive exposition by Carnation's "sales manager for the West" (R. 1189-1194). Carnation's sales in Salt Lake were shown in two (inconsistent) exhibits offered by respondents (D. Ex. C-O; R. 1163, 5775; D. Ex. A-35; R. 1065, 5827; compare R. 5775-5776 with R. 5829-5832).

c. Carnation's Sales Were at a Loss Planned in Advance.

Carnation's sales of frozen fruit pies in Salt Lake in 1960, resulted in losses ranging up to $.84 per dozen on a sales price averaging $3.04 per dozen (Pl. Ex. 28; R. 261, 2184, 2185). In Salt Lake, Carnation's frozen pies generally sold at a loss throughout the years 1959, 1960 and 1961 (Ibid.).

During the same period, however, Carnation showed profits in its Frozen Food Division in Northern California and the Western Division as a whole (Pl. Ex. 22; R. 241, 2167, 2168).

Carnation forecast its losses in the intermountain area in advance (R. 443-445; Pl. Ex. 5; R. 446, 1656). The forecasts were based upon current price lists and upon estimates of expected volume obtained from the "merchandising manager" of Carnation's Frozen Foods

Division (R. 442). But the "merchandising manager" was himself oblivious to the fact that the Carnation Frozen Foods Committee was planning losses in his area; he said "* * * it's not my responsibility" (R. 1179-1180). The responsibility for approving Carnation's programs for selling at a loss "would be the frozen food committee" (R. 1180). That committee "was originally organized as a management committee of the executive committee of the board" (R. 1197; see also Pl. Ex. 69; R. 458, 2512; Pl. Ex. 70; R. 458, 2517; Pl. Ex. 71; R. 458, 2522; Pl. Ex. 72; R. 458, 2524; Pl. Ex. 73; R. 458, 2526; Pl. Ex. 74; R. 458, 2527).

Carnation's "Sales Manager for the West" was likewise oblivious to the fact that sales in his area were sales below cost (R. 1194-1195). He did not know who the man was in the Carnation organization who fixed Carnation's sales price (R. 1194).

Carnation management was not oblivious, however, to the tax consequences of its losses on frozen pies in the context of a generally profitable corporation. The budgets of Carnation's Frozen Foods Division contained an item called "reserve for income tax" which reduced the Division's losses by approximately the amount of the corporation's tax benefit to arrive at "net profit after tax." (Pl. Ex. 5; R. 446, 1656, 1670, 1686, 1688, 1694, 1700, 1707, 1725, 1729, 1736, 1740, 1750, 1754, 1758, 1763, 1764, 1769, 1770, 1774, 1781, 1782, 1786, 1792, 1816, 1820, 1824).

Carnation's 1959 profit and loss projections can be represented in tabular form as follows:

| Profit Areas | | Loss Areas | |
|---|---|---|---|
| Southern Calif. | $ 96,448 | Mountain States | ($12,648) |
| Northern Calif. | 81,508 | Pacific Northwest | ( 13,229) |
| Arizona | 3,316 | | |
| | $181,272 | | ($25,877) |

(Pl. Ex. 5; R. 446, 1656, 1663)

In comparing actual results (as opposed to budget projections) of profit and loss, it can be seen that Carnation had consistent losses in its Frozen Foods Division in the Pacific Northwest and Mountain States territory, but consistent high profits in the Northern California territory (Pl. Ex. 22; R. 241, 2167, 2168). These profits and losses may be represented in tabular form, to the nearest dollar, as follows:

| | Northern California (Profits) | Pac. N. W. & Mountain States (Losses) |
|---|---|---|
| 1959 | $ 42,276 | ($ 16,547) |
| 1960 | 123,017 | ( 78,245) |
| 1961 | 87,262 | ( 46,621) |
| Total | $252,554 | ($141,413) |

(Ibid.)

Doctor Anderson, respondents' economics expert, testified that sales by a large corporation at a loss in a regional market, where that loss was planned in advance, would be evidence of some ulterior motive (R. 1122-1124). He also testified that if a company sold at lower prices 750 miles from its plant than it did at the plant door that it indicated "less than perfect pricing" and was "unnatural" (R. 1130). He further testified that the price decline in petitioner's trading area might have been the result of predatory pricing as "one of the possibilities" (R. 1113-1115).

**8. Petitioner's Case Against Continental.**

Respondent Continental entered the frozen food business by acquiring the Morton Packing Company on November 30, 1955 (R. 271, 274). In the years 1958 through 1961, Continental had total net sales in excess of one and one-half *billion* dollars (Pl. Ex. 31; R. 256, 2202). Its total net profit before taxes was almost seventy-five million dollars (Ibid.). By any index, Continental's "Morton" was one of the two largest selling brands of frozen fruit pies in the United States (Pl. Ex. 61; R. 437, 602, 2275; R. 274). Fruit pies were just a part of the broad "Morton" line of frozen products (R. 71-72, 274, 649).

Continental's "Morton" brand was well known in Salt Lake and over the years covered by the complaint, Morton was a "price leader," affecting the market price even on small volume (R. 804-807). Its 1961 price cuts in Salt Lake increased its volume 773% over the average of the three preceding years (D. Ex. A-35; R. 1065, 5827, 5829-5832).

Continental's gross sales of frozen foods in certain western states (Regions VII and VIII through 1960 and W & I thereafter) (R. 242-245; Pl. Ex. 23; R. 245, 2175) were slightly in excess of three million dollars for the years 1958 through 1961, but there was a $12,500 loss instead of a profit (Pl. Ex. 31; R. 256, 2202).

Respondent Continental's frozen fruit pies for sale throughout the United States were made in just three plants: Crozet, Virginia, Webster City, Iowa, and (after February 1961) by a contract packer in Watsonville, California (R. 71, 72, 762-763; Pl. Ex. 18; R. 121, 2154). Continental shipped frozen fruit pies long distances back

and forth across the continent from time to time (R. 72, 73, 266, 532-534). Salt Lake was the "midway point" for Continental between its eastern plants and west coast points (R. 651-652).

a. Continental's Morton Pie.

In 1961, Continental was selling a 22-ounce apple pie to buyers in Salt Lake for $2.55 per dozen (Pl. Ex. 14; R. 114, 2057). At the same time, it was offering Safeway a 24-ounce apple pie at $3.10 per dozen (R. 100-101). The difference in the cost of production was 25 to 35 cents per dozen (R. 122).

Kitchin, vice-president in charge of Continental's frozen pie production testified that on inspection of 22 and 24-ounce pies, "obviously the pies appear to look the same" (R. 289). He was corroborated by Halvarson, Morton's regional sales manager, who agreed that the only difference in appearance was that the 22-ounce pan had a slightly sharper slant, very difficult to discern (R. 680). There was testimony that on the retail level most consumers cannot tell the difference between a 20-ounce, a 22-ounce and a 24-ounce pie (R. 673, 879-880, 1103). Pet's 20-ounce Swiss Miss sold at wholesale and at retail prices higher than those of heavier competing pies (R. 167-168, 682, 702-703, 824-827, 1103; D. Ex. A-35; R. 1065, 5827, 5841, 5843). In preparing his market share study, respondents' economics expert concluded that "consumers buy pie as pie and not by the ounce" (R. 1103).

Nevertheless, the Court of Appeals viewed the prices of the 22-ounce Morton pie on "price-per-ounce" basis (R. 1481).

b. Continental's Marketing System.

Continental refused to quote prices f.o.b. its plants; it used a zone delivered price system with various deviations between different places within its zone (R. 73, 740).

Continental sold its Morton frozen foods through brokers (R. 649). The brokers were paid on a commission basis, based on sales volume, not profits (Pl. Ex. 19; R. 132, 2158). Moreover, Halvarson, Continental's sales manager responsible for dealing with brokers, was paid a bonus to increase sales volume without regard to whether the sales were at a profit or at a loss, and he did not know whether the sales he made were profitable to Continental or not (R. 275-276, 687).

Continental's broker in Salt Lake as of September 26, 1960 was Stanley Chapman (Pl. Ex. 19; R. 132, 2158). He testified that he was contacted by Halvarson, regional sales manager for Continental "about two weeks, ten days, it might have even been a week" (R. 150) after a telephone conversation in which he had told Gaylen Rigby, Utah Pie's sales manager, that "he was going to obtain another frozen pie account, one that was a national brand; that he was going to get . . . Utah Pie." (R. 560. Compare R. 149). Halvarson placed the date on which he contacted Chapman as October 14, 1960 (R. 660). The letter by which Chapman was appointed, however, showed that he had actually been hired by Morton on September 26, 1960, prior to that conversation, and prior to his threatening conversation with Gaylen Rigby (R. 559-560; Pl. Ex. 19; R. 132, 2158).

Chapman immediately asked for, and got, a special promotional allowance on Morton frozen pies (R. 661, 679). About eight months later, Continental took Chapman's recommendation to cut its apple pie price to $2.55 per dozen, plus freight, for its Salt Lake customers (R. 674-675). This price was Continental's lowest price anywhere, and the lowest price Salt Lake had ever seen (R. 670-671, 727; D. Ex. A-35; R. 1065, 5827). Continental's avowed purpose was to get new business, not keep an existing customer (R. 675). The $2.55 offer was first made in mid-June of 1961 (Pl. Ex. 15; R. 104, 2061). It was renewed effective July 31, expiring on August 12 (Pl. Ex. 16; R. 113, 2062, 2067).

Safeway bought two shipments of Morton pies; when Safeway ran out of the first shipment of pies it bought on the second shipment, and spent a "three or so weeks" running through that shipment (R. 695-696). The offer was in effect more or less continuously from June 16 through August 12, 1961 (see Pl. Ex. 14; R. 114, 2057; Pl. Ex. 15; R. 104, 2061; Pl. Ex. 16; R. 113, 2062, 2067).

Continental's sales in Salt Lake at $2.55 per dozen were not only lower than any previous price of any seller, but $1.45 per dozen lower than a contemporaneous sale of 1800 dozen apple pies to Fox Markets in Los Angeles, California (Pl. Ex. 10; R. 80, 2052). One day prior to the sale to Fox Markets (at $4 per dozen) Continental sold 550 dozen apple pies in Ogden, Utah for $2.59 per dozen and 25 dozen apple pies in Seattle for $3.50 per dozen (Pl. Ex. 10; R. 90, 2052; Pl. Ex. 11; R. 91, 2054; Pl. Ex. 12; R. 81, 2055; R. 79-81).

On July 20, 1961, Continental sold apple pies in Oakland, California, at $3.76 per dozen (Pl. Ex. 13; R. 84, 2056). Oakland is 90 to 100 miles from Continental's Watsonville plant (R. 84). Eight days later, Continental sold 1,000 dozen apple pies to Grocers Wholesale in Salt Lake at $2.55 per dozen, freight prepaid (Pl. Ex. 14; R. 114, 2057). Although Continental produced testimony to the effect that the "PPD" notations on some of its $2.55 apple pie invoices were in "error," it is undisputed that any Salt Lake buyer could have a "pickup allowance" of 30 cents per dozen, resulting in a price of $2.55 f.o.b. Watsonville, California, for Salt Lake buyers (R. 626-627). The freight from Continental's California plant to Ogden, Utah was $.30 per dozen (R. 86, 663).

**c. Continental Engaged in Significant and Sustained Price Discrimination in Plaintiff's Trading Area.**

Prior to 1961, Continental sold relatively few Morton pies in Salt Lake City (Pl. Ex. 110; R. 623, 4705; D. Ex. A-35; R. 1065, 5827, 5829-5831). It did, however, sell substantial quantities throughout other important parts of petitioner's trading area (see Denver invoices, Pl. Exs. 77-80, 83 and 89; R. 536-537, 2625; Pl. Ex. 78; R. 536-537, 2773; Pl. Ex. 79; R. 536-537, 2987; Pl. Ex. 80; R. 536-537, 3355; Pl. Ex. 83; R. 533, 3617; Pl. Ex. 89; R. 542, 4405; Washington invoices, Pl. Exs. 84-87; R. 538, 3618; Pl. Ex. 85; R. 538, 3796; Pl. Ex. 86; R. 538, 3984; Pl. Ex. 87; R. 538, 4188; Oregon invoices, Pl. Ex. 88; R. 542, 4373).

There were substantial and continuing discriminations in the prices which Continental charged for its Morton pies in Denver, particularly after Utah Pie's initial suc-

cess in selling "Frost 'N Flame" pies there in the fall of 1959. From a price of $5.16 per dozen for apple pies in October, 1958, and $3.93 in May, 1959, Continental's price descended to $3.65 per dozen in December, 1959 (R. 542; Pl. Ex. 89; R. 542, 4405). In February 1960, apple pie was as low as $3.35 and in October 1960, it was down to $3.20 (R. 542). In June 1961, Continental's Morton apple pie went as low as $3.00 in Denver (Ibid.). At that time, Morton apple pie was selling for some $4.00 per dozen in Los Angeles (Pl. Ex. 10; R. 80, 2052). Continental's "Morton" was one of the two largest selling brands in Denver (R. 752).

In January 1960, Morton apple pie produced in Crozet, Virginia, was selling at $3.35 per dozen in Denver, freight prepaid by the seller (R. 534). At that time, Continental's Morton apple pie was selling for $3.80 per dozen in Virginia, where the plant was located (Ibid.).

Some of the pies which Continental sold in Denver were produced at its Crozet, Virginia, plant, others were produced at its Webster City, Iowa, plant (R. 534; Pl. Ex. 83; R. 533, 3617). Petitioner had a freight advantage on sales in Denver over Continental with respect to Continental's plants in California, Iowa and Virginia (R. 541).

Utah Pie introduced evidence on Continental's frozen pie sales in Denver, Oregon and Washington (Denver—Pl. Ex. 77; R. 536-537, 2625; Pl. Ex. 78; R. 536-537, 2773; Pl. Ex. 79; R. 536-537, 2987; Pl. Ex. 80; R. 536-537, 3355; Pl. Ex. 83; R. 533, 3617; Pl. Ex. 89; R. 542, 4405; Washington—Pl. Ex. 84; R. 538, 3618; Pl. Ex. 85;

R. 538, 3796; Pl. Ex. 86; R. 538, 3984; Pl. Ex. 87; R. 538, 4188; Oregon—Pl. Ex. 88; R. 542, 4373).

Utah Pie submitted damage exhibits claiming damages for all of those areas as against Continental (Pl. Ex. 95; R. 574, 4591; Pl. Ex. 97; R. 581, 4598; Pl. Ex. 98; R. 583, 4600).

Except for Utah Pie's claim against Pet for loss of Safeway Bel Air business in the Denver Division of Safeway (Pl. Ex. 95; R. 574, 4591; Pl. Ex. 99; R. 584, 4602) Utah Pie's *entire* Denver claim was against Continental (Pl. Ex. 95; R. 574, 4591; Pl. Ex. 98; R. 583, 4600).

Counsel for Utah Pie argued his contentions with respect to Denver, Oregon and Washington at length (R. 1236, 1238, 1269, 1271, 1275, 1276, 1342, 1343). Continental counsel also made reference to those areas in his argument to the jury (R. 1291, 1293). He said "And then there have been charges against Morton in the Denver market . . ." and proceeded to discuss them at length (R. 1293).

Pl. Ex. 111 was used by respondents' accounting expert in preparing certain charts, and was identified as having been prepared by Continental counsel from Morton price lists and deals (R. 627, 629, 4707). It shows a persistent pattern of discriminatory pricing with Denver as the low-price area:

1959
Apple

| Time Period | Denver Price | San Francisco Los Angeles and Arizona Price | Difference |
|---|---|---|---|
| April 20-Nov. 1 | $1.77½ | $1.95 | 17½¢ |
| Nov. 2-Nov. 14 | 1.62½ | 1.95 | 32½¢ |
| Nov. 15-Dec. 31 | 1.77½ | 1.95 | 17½¢ |

1960
Apple

| Time Period | Denver Price | High Price Area | Difference |
|---|---|---|---|
| Jan. 1-31 | $1.80 | $1.95 L.A. & Ariz. | 15¢ |
| Feb. 2-13 | 1.65 | 1.95 L.A. & Ariz. | 30¢ |
| Feb. 14-28 | 1.80 | 1.95 Arizona | 15¢ |
| Feb. 29-Mar. 27 | 1.65 | 1.95 Arizona | 30¢ |
| Mar. 27-April 3 | 1.80 | 1.95 Arizona | 15¢ |
| May 2-May 14 | 1.65 | 1.79½ Ariz. & S.F. | 14½¢ |
| May 30-June 18 | 1.65 | 1.79½ Arizona | 14½¢ |
| July 4-Dec. 31 | 1.60-1.80 | 1.97½ Arizona | 17½-37½¢ |

1961
Apple

| Time Period | Denver Price | High Price Area | Difference |
|---|---|---|---|
| Jan. 1-May 29 | $1.50-1.82½ | $2.00 Los Angeles | 17½-50¢ |
| June 5-June 17 | 1.50 | 1.65 San Francisco | 15¢ |
| June 30-Aug. 13 | 1.50-1.82½ | 2.00 San Francisco | 17½-50¢ |
| Aug. 14-Sept. 3 | 1.82½ | 2.00 Seattle, Portland, Spokane | 17½¢ |

(Pl. Ex. 111; R. 627, 629, 4707)

While not as clear as Pl. Ex. 111 (because the record contains only a few California invoices) the Continental invoices also show a discriminatory low price pattern in Salt Lake and Denver as compared with Seattle and other distant parts of Utah Pie's trading area. A table of such discriminations, based upon actual sales reflected in Continental invoices is attached as Appendix C to this brief.

Continental's own witnesses and exhibits make repeated references to Denver. (See R. 643, 650, 655; D. Ex. M. 26; R. 634, 5454). Continental produced a Denver witness at the trial to testify about Utah Pie's marketing efforts there, and general market conditions in that city (R. 742-761).

Nevertheless, the Court of Appeals held that petitioner's judgment may not be sustained in any part by reference to the Denver market:

> "It is a theory clearly not submitted to the jury by the court in its charge, nor passed on by the jury" (R. 1505).

**d. The Evidence Showed That Continental Intended to Injure Plaintiff.**

Continental's discriminatory low prices were aimed directly at Utah Pie; Morton's vice-president in charge of production, admitted it on the stand (R. 69, 86, 121). So did Morton's regional sales manager; he had said that Morton's lowest price in Salt Lake "was aimed at him [Utah Pie] as a competitor to get business in his customers' account" (R. 648, 671).

Continental's $2.55 price for a dozen apple pies in June of 1961 was below even the bare cost of production, sale

and delivery (Pl. Ex. 29; R. 268, 2187). Making allowances for Continental's other costs, there were losses continuously from late 1958 on Continental's frozen pie sales in the Salt Lake area (Pl. Ex. 29; R. 268, 2187; see also R. 127, 246, 636-642, 673).

Continental lost money overall on its frozen food operations for the four years 1958-1961 in the Regions where it competed with Utah Pie (Pl. Ex. 31; R. 256, 2202).

Hereford, general accounting manager of the Morton Division of Continental, identified respondent's exhibits M-25 (R. 634, 5453) and M-26 (R. 634, 5454) which purport to show that Continental's frozen pie sales in Utah and Idaho were profitable (R. 634). He testified, however, that if Continental's costs had been allocated in those exhibits on the same basis which Continental used for its own internal purposes, there would be a loss (R. 639-640). Hereford testified that if Continental's whole business showed "gross profits" like those in its pie operation, it would be bankrupt (R. 640-641).

However, the Court of Appeals adopted as its own, and appended to opinion as Appendix VI, a chart substantially identical to Continental's exhibit M-22, purporting to show Continental's $2.55 price was above cost. (Compare R. 1522 with D. Ex. M-22; R. 643, 5450).

The Court of Appeals summarized its analysis as follows:

> "Invoices of sales of frozen pies by Continental in the Salt Lake City market during the period 1958 to January, 1962, inclusive, showed 142 items were sold at a profit and three items, one in 1958, one in 1961,

and one in January, 1962, at a loss, before allocation of overhead costs. Its over-all sales showed a profit before deduction of overhead. After such allocation, an overall loss was reflected. Had Continental been able to develop a substantial volume of sales in such market, it no doubt would have been able to realize a profit after overhead was charged." (R. 1483).

**9. The Evidence Showed That Respondents' Price Discriminations Had an Injurious Impact Upon Utah Pie.**

Utah Pie claimed injuries of three sorts:

(1) loss of profits due to depressed prices; (2) loss of profits due to reduced volume; and (3) injury to the good will value of its business (Pl. Ex. 95; R. 574, 4591). Utah Pie demonstrated that respondents' activities had driven frozen pie prices down sharply in the period after it entered the business (See Pl. Ex. 4; R. 67, 1530; Pl. Ex. 93; R. 552, 4587; D. Ex. A-35; R. 1065, 5827). Utah Pie demonstrated that in spite of its uniquely advantageous location, its high quality product and its modern and efficient plant, its market share had diminished drastically (Pl. Ex. 96; R. 581, 4592). Unchallenged testimony also proved a diminution in the good will value of Utah Pie's business of $75,000 (R. 570). Although the evidence showed that Utah Pie did make a modest profit in 1959, 1960 and 1961 (Pl. Ex. 92; R. 551, 4586), the jury was asked to find that its growth would have been substantially greater in the absence of respondents' price discriminations (R. 1281-1282).

**a. The Evidence Showed That Petitioner's Prices Were Driven Down.**

The decline in prices which petitioner realized on its pies is clearly demonstrated for the immediate Salt Lake area by the study prepared by Dr. Anderson, respondents' economics expert (D. Ex. A-35; R. 1065, 5827). His study shows a decline in the average price which petitioner received for Utah brand apple pie from $2.15 per case ($4.30 per dozen) in February of 1958 to $1.60 per case ($3.20 per dozen) in August of 1961 (Pl. Ex. 93; R. 552, 4587; D. Ex. A-35; R. 1065, 5827, 5835-5836 "price"), a decline of about 26%.

The picture for Utah Pie's entire marketing area was very similar to that shown by Dr. Anderson's more limited study of the Salt Lake-Boise area (Pl. Ex. 4; R. 67-69, 1530).

Utah Pie presented to the jury damage charts setting forth the amounts of damages which they asked the jury to find, predicated upon the jury's determining prices which would have prevailed in plaintiff's trading area but for respondents' price discriminations (Pl. Ex. 95; R. 574, 4591; Pl. Ex. 96; R. 581, 4592; Pl. Ex. 97; R. 581, 4598; Pl. Ex. 98; R. 583, 4600; Pl. Ex. 99; R. 584, 4602; Pl. Ex. 100; R. 585, 4604; Pl. Ex. 101; R. 586, 4606).

There was direct testimony by a defense witness that in the absence of respondents' price reductions, the price level in the market would have stayed about $3.70:

> "Q. Now, Mr. Degenhardt, assume for me, if you will, that none of the three defendants' prices had changed in the Salt Lake City market from 1957 on, that they stood at the '57 price; would the price level

in the market have stayed at $3.70 or above per dozen?

A. I would say so, yes." (R. 725).

**b. The Evidence Showed That Petitioner's Market Share Declined.**

In addition to damages resulting from an erosion of the prices which it was able to obtain for its products, petitioner suffered a very substantial loss of business.

Petitioner's share of the market for "advertised" brand pies (i.e., other than private label) declined dramatically from 1958 to 1961 (Pl. Ex. 96; R. 581, 4592). Starting with 70.41% of petitioner's and respondents' total sales in 1958, Utah Pie dropped steadily each year to 33.64% in 1961 (Ibid.). By contrast every one of the respondents' shares increased; Pet moved up steadily from 17.32% in 1958 to 37.94% (and the largest seller of advertised brands in the market) in 1961 (Ibid.).

Shown graphically, petitioner's market share in the immediate Salt Lake City area for its advertised brand was as follows:

| | Utah Pie |
|---|---|
| 1958 | 70.41% |
| 1959 | 58.69% |
| 1960 | 40.28% |
| 1961 | 33.64% |

(Source: Pl. Ex. 96; R. 581, 4592)

Dr. Anderson, respondents' economics expert (R. 1059, 1087), testified that he was "certain" that there is a distinction between enjoying a brand business as against a private brand business, and that a substantial loss of

market share by an independent of its brand product "could be" a competitive injury (R. 1118-1119), although he contended that the "Swiss Miss" market share could not properly be compared with the market share of petitioner's "Utah Pie" brand (R. 1119).

Considering sales of *all* brands including private labels and brands of sellers "other" than parties to the lawsuit, petitioner's market share of the immediate Salt Lake City area was as follows:

| | Utah Pie |
|---|---|
| 1958 | 66.5% |
| 1959 | 34.4% |
| 1960 | 45.8% |
| 1961 | 45.2% |

(Computed from Pl. Ex. 62; R. 437, 2323.)

Halgren, vice-president of Carnation, testified:

> "Increasing distribution doesn't necessarily mean increasing sales, and it doesn't mean by any means that you are keeping pace with the market. Sometimes the market grows from 100,000 to 200,000 cases in a single year. *If you don't grow with that, you are not getting your share.*" (R. 1220-1221; emphasis added.)

**c. The Jury Verdicts Were Well Within the Evidence.**

Petitioner's damage calculations as to Pet would have supported a verdict for $261,046 actual damages (Pl. Ex. 95; R. 574, 4591). In fact, the jury returned a verdict of

$44,197, well within the damages shown by the evidence against Pet (R. 41, 1406).

Petitioner's damage calculations would have supported a verdict of $381,197 against Continental (Pl. Ex. 95; R. 574, 4591). In fact, the jury returned a verdict of $24,994 (R. 41, 1405-1406).

Petitioner's damage calculations would have supported a verdict for $98,892 against Carnation (Pl. Ex. 95; R. 574, 4591). In fact, the jury returned a verdict of $29,277 (R. 42, 1406).

## SUMMARY OF ARGUMENT

These are primary line price-discrimination cases in which Utah Pie had damage verdicts against the three respondents for their regional price-cutting in Utah Pie's trading area (R. 41-42, 1405-1406).

The Court of Appeals set aside the verdicts on the sole ground that Utah Pie's evidence was insufficient to show that any of the respondents ". . . by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that [respondent], by price differences or other acts, would do so in the future. . . ." (R. 1502, 1504, 1507).

The Judgment of the Court of Appeals remanded the case ". . . with instructions to enter judgment for the defendants" (R. 1526).

In reaching that conclusion, the Court of Appeals has completely misconceived the "incipiency" test which is embodied in Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act. Sections 2, 3 and 7 of the Clayton Act outlaw certain trade practices where their effect "may be to substantially lessen competition . . . or tend to create a monopoly. . . ." This "incipiency" test is substantially the same under all three sections. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 329, 82 S.Ct. 1502, 1526.

In testing the likely effect of respondent's price discriminations, the Clayton Act decisions of this Court are controlling. They include, among many others, such cases

as *United States v. Pabst Brewing Co.*, 384 U.S. 546, 86 S.Ct. 1665; *United States v. Von's Grocery Co.*, 384 U.S. 270, 86 S.Ct. 1478; *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12; *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 80 S.Ct. 1267; *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 75 S.Ct. 148.

Respondents' great size, and large overall profits, coupled with their demonstrated willingness to intentionally take losses on particular products at particular times and places, gives rise to a reasonable inference that competition is endangered.

All respondents entered the frozen pie business by way of acquisitions. They rapidly became (if they were not at the outset) the major "national" manufacturers of frozen fruit pies, using their total corporate resources to finance their growth. Although entry into the industry was said to be easy, the industry was shown to be highly concentrated, with these three respondents among the four largest producers in the nation.

Utah Pie was a small, family concern in Salt Lake City, with 30 years of history in the pie business. It began to freeze some pies in 1957, and rapidly obtained the largest market share of any seller in Salt Lake. Utah Pie had the advantage of having the only frozen pie plant in the intermountain area; respondents' nearest western plants were all in California. Respondents' nearest plant to the east was Continental's, in Webster City, Iowa.

From its high point in 1958, Utah Pie's market share in Salt Lake City fell off sharply in 1959, rebounding only slightly in 1960 and 1961. Respondents all maintained or

increased their market shares in Salt Lake, but prices dropped substantially. The "others" (i.e. sellers other than respondents and Utah Pie) achieved their greatest Salt Lake City market shares in 1959, dropping off to a collective total market share less than that of any respondent in 1961.

Utah Pie had much the same experience in attempting to sell in outlying parts of its trading area. After initial success in Colorado (especially Denver), Montana, Wyoming and Nevada in 1958, 1959 and 1960, Utah Pie lost ground in its fiscal 1961 (in absolute terms, not merely market share) in a rapidly expanding market.

Utah Pie showed that each respondent had engaged in important price discriminations at relevant times, with low prices in Salt Lake City and in other parts of Utah Pie's trading area. Utah Pie asked the jury to infer, on the basis of all of the evidence in the case, that each respondent's price discriminations were reasonably likely to substantially lessen competition, or to tend to create a monopoly, that they were unlawful, and that they had injured Utah Pie in amounts greatly in excess of the jury's verdicts.

The jury found for Utah Pie. The Court of Appeals found for respondents. The decision of the Court of Appeals cannot be permitted to stand; it would substantially eliminate private enforcement of Section 2(a) of the Clayton Act.

Under Clayton Act standards, the jury's decision was clearly reasonable solely on the basis of the "structural" facts summarized above.

But there was additional evidence of respondents' "conduct" (and the intent behind that conduct) which the jury could also have weighed in reaching its verdicts. That evidence showed respondents' intent to injure or destroy competition in general and Utah Pie in particular. It consisted of express statements to the effect that price cuts were aimed at Utah Pie (by Continental) and industrial espionage and a "fighting brand" (by Pet) as well as general inferences of intent to be drawn from sales at a loss (all respondents) and calculated advance planning for sales at a loss (by Pet and Carnation). There was also the testimony of respondents' economics expert that respondents' discriminatory pricing was itself "unnatural," in addition to other circumstantial evidence of respondents' intent.

The Court of Appeals passed over all of Utah Pie's "intent" evidence as if it had no relevance at all to the proceedings. Its strongest statement regarding any of the evidence was that Pet's industrial espionage was "reprehensible and is not to be condoned" (R. 1476). It treated the evidence as irrelevant to the issues in the case. In thus dismissing evidence of respondents' predatory intent, the Court of Appeals has disregarded this Court's injunction that facts are for jury evaluation where ". . . motive and intent play leading roles . . . and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S.Ct. 486, 491.

In reversing the judgments for Utah Pie, the Court of Appeals committed a number of subsidiary errors in interpreting the facts and in applying the law to those facts. Among those errors are the following:

—It completely, and expressly, disregarded the impact of Pet's Safeway contract, under which Pet supplied private label "Bel-Air" pies at prices very substantially below Pet's prices for its own "Pet-Ritz" pies, although Pet-Ritz and Bel-Air were stipulated to be of like grade and quality (R. 1373).

—It considered only whether Pet's price discriminations on Safeway Bel-Air pies precluded competitors from the business of packing Bel-Air for Safeway; it disregarded the fact that Bel-Air competes with other brands *even for the business of the Safeway stores themselves* (R. 544, 698, 704-705, 707, 1138; Pl. Ex. 46; R. 411, 2249).

—It held that Pet had proved a "cost justification" defense to its Pet-Ritz/Bel-Air discriminations as a matter of law although Pet made no attempt to explain the documentary evidence purporting to relate to its costs, and although there was no documentary evidence whatever on Pet's costs for almost 15 months in the middle of the damage period.

—It disregarded the effect of respondents' price discriminations upon general levels of prevailing market *prices*, apparently on the assumption that the only adverse effect of a price discrimination cognizable in law is a *diversion* of business from one seller to another.

—In assessing the extent of respondents' price discriminations, it treated advertising allowances as identical to straight price reductions, despite repeated testimony to the contrary (R. 110-112, 160, 462, 687-689, 1030) and in direct conflict with much considered legal authority distinguishing between advertising allowances and price re-

ductions. See e.g. *R. H. Macy & Co. v. FTC*, 326 F.2d 445, 449-450 (2d Cir. 1964).

—It based its opinion in material part upon respondents' post-complaint conduct, which was quite probably modified in response to the pending lawsuit, and which is in any event not conclusive. See *United States v. Continental Can Co.*, 378 U.S. 441, 463, 84 S.Ct. 1738, 1750.

—It expressly excluded from its consideration Continental's discriminations in Denver, although the whole course of the trial, the evidence and the argument clearly showed that Denver was at all times part of Utah Pie's case against Continental.

—It viewed each respondent's discriminations as if they had occurred in a vacuum, ". . . tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each" (*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410), in contravention of *Standard Oil Co. of Calif. v. United States*, 337 U.S. 293, 314, 69 S.Ct. 1051, 1062.

By its re-evaluation of the evidence of the case, its acceptance of controverted testimony adverse to Utah Pie, and its persistent refusal to draw reasonable inferences in support of the verdict, the Court of Appeals has flagrantly invaded the province of the jury, in violation of the Seventh Amendment to the United States Constitution.

With respect to the Court of Appeals' instruction on remand, there was error even if the Court of Appeals correctly held Utah Pie's evidence insufficient to sustain its verdicts. Under usual canons of construction, the re-

mand with "instructions to enter judgment for the defendants" would not permit Utah Pie to make a motion for a new trial under FRCP 50(b). Therefore, it is in direct conflict with this Court's decisions in *Weade v. Dichman, Wright and Pugh*, 337 U.S. 801, 69 S.Ct. 1326; *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S.Ct. 752; and *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S.Ct. 246.

Although Fed. R. Civ. P. 50(d) permits an appellee to conditionally urge reasons why he should have a new trial, it does not have application when the potential grounds for a new trial are not reasonably foreseeable until the Court of Appeals has decided the case. Although Fed. R. Civ. P. 50(d) assumes a power in the Court of Appeals to remand a case for judgment without possibility of a new trial, it does not permit such a remand in this case. Justice requires that if Utah Pie must be denied its judgment on the existing verdicts, it is at least entitled to a new trial. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 78 S.Ct. 893; *Weade v. Dichman, Wright and Pugh*, 337 U.S. 801, 69 S.Ct. 1326.

## ARGUMENT

### 1. RESPONDENTS' CONDUCT POSED AN "INCIPIENT" THREAT TO COMPETITION UNDER CLAYTON ACT STANDARDS.

#### a. Sections 2, 3, and 7 of the Clayton Act Embody the Same Test.

Sections 2, 3 and 7 of the Clayton Act[5] contain substantially identical language: ("may be to substantially lessen competition . . . or tend to create a monopoly [of] [in] any line of commerce"). This Court has consistently construed that language to have the same meaning in all three sections. *United States v. Philadelphia National Bank*, 374 U.S. 321, 365, 83 S.Ct. 1715, 1742; *Brown Shoe Co. v. United States*, 370 U.S. 294, 329, 82 S. Ct. 1502, 1526.

The Robinson-Patman amendments to the Clayton Act gave Section 2 a new emphasis and direction in "secondary line" cases involving discriminations between competing purchasers, but the original application of the statute to "primary line" cases was retained. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543-545, 80 S.Ct. 1267, 1271-1272.

Although the issue in *Anheuser-Busch* was the definition of "discrimination," this Court went on to say "it might be argued that the existence of predatory intent bears upon the likelihood of injury to competition, and that a price reduction below cost tends to establish such intent." (363 U.S. at 552; 80 S.Ct. at 1276, footnotes omitted). Where, as here, the below-cost discriminatory selling is by enormously powerful corporations selling in the trad-

---

[5]Oct. 15, 1914, C. 323, §§ 2, 3, and 7, 38 Stat. 730, 731, as amended 49 Stat. 1526, 64 Stat. 1125, 15 U.S.C. §§ 13, 14, and 18 (1964); see Appendix A to this brief.

ing area of a single, small competitor for extended periods, and planned in advance, the point is not merely arguable; it is dispositive.

In the four years 1958 through 1961, respondents suffered collective losses of $272,124 on frozen pies in the area where they competed with Utah Pie amounting to about 96% of Utah Pie's total assets of $284,334 in its best year (Compare Pl. Ex. 31; R. 256, 2202 with D. Ex. A-46; R. 997, 5847). Respondents' losses amounted to 396% of Utah Pie's net worth in its best year, or 1,560% of Utah Pie's net income before taxes in its best year (Ibid.).

However, respondents' collective net profits before taxes on their *overall* business in the years 1958 through 1961 amounted to $182,799,551 or 339,500% of Utah Pie's net pre-tax earnings of $53,840 in those years (Compare Pl. Ex. 31; R. 256, 2202 with Pl. Ex. 92; R. 551, 4586).

Under applicable Clayton Act standards, as construed by this Court in cases under Sections 3 and 7, as well as 2(a), there can be no doubt that the regional price discriminations indulged in by respondents with that kind of market power were reasonably likely to substantially lessen competition or tend to create a monopoly and that Utah Pie is entitled to its judgment.

**b. Sections 2, 3 and 7 of the Clayton Act All Deal With the Misuse of Market Power to Foster Monopoly.**

Market power is a relative thing, a matter of scale. It can be based upon some exclusive right, such as a patent or trademark. It can also be based upon sheer, overwhelming size. Market power as such is not unlawful.

But market power is also a powerful tool for the acquisition of more market power, and, ultimately, of monopoly power. Market power can be extended. Sections 2, 3 and 7 of the Clayton Act were designed to prevent such extension by three methods (mergers, exclusive dealing, and predatory local price-cutting) which had commonly been used by the great 19th Century trusts to turn market power into monopoly. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543, 80 S.Ct. 1267, 1271. See also *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502; *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632.

Schemes to extend market power through tying contracts are unlawful under Section 3 of the Clayton Act even though the seller's market power in the tying product falls far short of monopoly. Thus tie-ins to patented items are universally held to violate Section 3 of the Clayton Act (see e.g. *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12; *International Business Machines Corp. v. United States*, 298 U.S. 131, 56 S.Ct. 701) although a patent, as such, need not confer power amounting to a "monopoly". *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, 350.

Similarly, this Court has repeatedly struck down mergers, both horizontal and vertical, in cases where neither of the merging companies, nor the surviving company, possessed monopoly power. See *United States v. Von's Grocery Co.*, 384 U.S. 270, 86 S.Ct. 1478, *United States v. Pabst Brewing Co.*, 384, U.S. 546, 86 S.Ct. 1665; *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502.

c. The Large Conglomerate Enterprise Is a Threat to Competition Without More.

Neither bigness nor diversification is itself illegal. But as Dr. Corwin Edwards has demonstrated, the combination of those elements may create a serious threat to viable competition:

> "The mere fact that diversified goods are sold by a single enterprise is not, of itself, ground for concern. So long as this takes place on a small scale in a setting in which diversification gives the diversified firm no unusual power, specialized firms can and do compete with conglomerate ones, and there is no significant effect upon the quality of competition. But the question arises whether bigness changes the impact of conglomeration."[6]

After examining some of the characteristics of conglomerate enterprise, Edwards answers his question in part as follows:

> ". . . a large conglomerate enterprise may have significant power. This power is not measured by the size of the conglomerate's market share in particular markets. It extends to markets in which the conglomerate's market share is too small to constitute monopoly or participation in oligopoly. It is derived from two facts: First, that the enterprise has resources much larger than those of most of its competitors; and second, that these resources are spread across many markets." (Ibid. p. 42).

---

[6]Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., Economic Concentration Part I, Overall And Conglomerate Aspects, at 38-39.

Edwards goes on to say:

"A big firm has advantages over a smaller rival just because it is big. Money is power. A big firm can outbid, outspend, and outlose a small firm. It can advertise more intensively, do more intensive and extensive research, buy up the inventions of others, defend its legal rights or alleged rights more thoroughly, bid higher for scarce resources, acquire the best locations and the best technicians and executives. If it overdoes its expenditures, it can absorb losses that would bankrupt a small rival . . .

"Because a large conglomerate operates in many markets, it can divert income from one market to another. It can subsidize its losses in one market from its profits in another, or make investments in production for one market with resources derived from another. This fact gives a conglomerate exceptional leeway in market policy and exceptional possibility of imposing its will upon its more specialized rivals.

"Whereas a specialized firm dependent upon a single market cannot afford to lose substantial amounts of money for a substantial period of time, a conglomerate can do so in a selected market if it chooses. It can pursue longrun profit regardless of shortrun loss. It is thus immunized from some of the competitive pressures to which its specialized rivals must respond.

"Similarly, a conglomerate can subsidize some of its products indefinitely. It can adjust its prices so that products upon which it encounters vigorous competition are not asked to carry much of the overhead costs or joint costs, nor to provide much of the total profit, while products that are less competitive carry more of the load. If there is a later change in relative competition, price policy can change likewise. So long

> as competition is not uniformly vigorous over the conglomerate's entire field of activity, such subsidization can be an enduring handicap for specialized competitors. The conglomerate can maintain its place in those parts of its field of operation in which other enterprises are more efficient." (Ibid. pp. 42-43).

Dr. Walter Adams of Michigan State University also testified before the Senate Subcommittee on the subject of conglomerate corporate structure. His conclusion:

> "... the basic objection to the conglomerate structure in American industry is that there are no advantages in terms of efficiency that this kind of bigness confers. This is almost bigness for the sake of bigness." (Ibid., p. 252).

**d. Discriminatory Pricing by Large Conglomerate Enterprises threatens Competition.**

In this case, the jury saw three big "conglomerates" in action. Each was willing to, and did, take losses on its frozen fruit pie sales in Utah Pie's trading area (Pl. Ex. 31; R. 256, 2202). Carnation and Pet planned the losses in advance (R. 397, 400-401, R. 443-445). And yet every respondent showed multimillion dollar overall profits in every year from 1959 through 1961 (Pl. Ex. 31; R. 256, 2202). Indeed, Pet never earned less than $7,000,000 for a full year, Continental never earned less than $15,000,000 and Carnation never dropped below $18,000,000 per year in net profit before taxes (Ibid.).

Whatever the practice be called (i.e. "investment spending" or "contribution to profit" or something else) respondents all subsidized their frozen pie sales in Utah Pie's trading area with profits from other products and

other places (Pl. Ex. 31; R. 256, 2202). They obtained further subsidy, not available to a single-product, regional firm, in the form of income tax deductions; the subsidization was done with "tax dollars" (R. 641). This is reflected not only in the law permitting a conglomerate enterprise to consolidate its tax return (Int. Rev. Code of 1954, §§1501, et seq.) but also in the actual figures which respondents used to show their profit and loss on the business (Pl. Ex. 7; R. 409, 1926; Pl. Ex. 5; R. 446, 1656).

The threat to competition which Dr. Edwards and Dr. Adams discussed in their Senate testimony is real. These respected authorities conclude that the mere *existence* of a conglomerate is a threat to competition. Surely a jury of reasonable men could conclude that three large conglomerates, all selling at subsidized discriminatory prices in the trading area of a single, small competitor, pose a reasonable likelihood of a substantial lessening of competition, or even of a tendency to create a monopoly.

The better-considered decisions under Section 2 of the Clayton Act bear out the jury's conclusion. This Court has "observed that Sec. 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency', before the harm to competition is effected. It is enough that they 'may' have the proscribed effect". *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 738, 65 S.Ct. 961, 967; Accord: *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822; *E. Edelmann & Co. v. Federal Trade Commission*, 239 F.2d 152 (7th

Cir. 1957), cert. denied 355 U.S. 941, 78 S.Ct. 426. Compare *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 176-177, 84 S.Ct. 1710, 1720.

Assuming arguendo that an actual injury to competition is required, Utah Pie satisfied that burden. For the injury to competition requirement of Section 2(a) (15 U.S.C. 13(a)) means only that the "lower price must prevent, or tend to prevent, competitors from taking business away from the merchant which they might have got, had the merchant not lowered his price below what he was charging elsewhere". *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir. 1945), cert. denied 326 U.S. 734, 66 S.Ct. 44.

A territorial price reduction made aggressively against weaker competitors injures competition within the meaning of Section 2(a). *H. J. Heinz Co. v. Beech-Nut Life Savers, Inc.*, 181 F.Supp. 452, 464 (S.D.N.Y. 1960). And injury to a single competitor may constitute the requisite injury (Ibid.).

Here, defendants have engaged in the "type of price cutting . . . held to be 'foreign to any legitimate commercial competition' even prior to the Robinson-Patman Act." *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 120; 75 S.Ct. 148, 151. They are, in the language of *Moore v. Mead*, "interstate combines" which have a competitive advantage "not by reason of their skills or efficiency but because of their strength and ability to wage price wars." (348 U.S. at 119, 75 S.Ct. at 150).

**2. THE COURT OF APPEALS' OPINION CONFLICTS WITH THE FOURTH CIRCUIT'S MARYLAND BAKING DECISION.**

While ignoring respondents' very great share of the entire United States frozen pie market (Pl. Ex. 61; R. 436, 602, 2275) the Court of Appeals placed great emphasis upon Utah Pie's market share in the immediate Salt Lake City area. It said:

> "Moreover, a contention that Utah Pie was entitled to hold the extraordinary market share percentage of 66.5, attained in 1958, falls of its own dead weight. To approve such a contention would be to hold that Utah Pie was entitled to maintain a position which approached, if it did not in fact amount to a monopoly, and could not exist in the face of proper and healthy competition." (R. 1507).

There is nothing in the record to support a suggestion that the jury concluded that Utah Pie was "entitled to hold" any particular market share; the verdicts were general in form (R. 41-42, 1405-1406). In closing argument Utah Pie's counsel made the following remarks on the subject:

> "We have zero business around the Torrance plant. Utah Pie Company has zero. So as between the Utah Pie and the defendants, they have a hundred percent in California, have a hundred percent in northern California. We have zero, because that's where their plants are. We are out of competition there.
>
> "Dr. Anderson had a chance to make a market study of the full area, which would have shown you something less, considerably less than 70 percent. We don't apologize for that 70 percent. We are prepared to take Dr. Anderson's study of that area, prepared to

take 1958, as a good base, normal year as to what the situation would have been . . ." (R. 1269).

In his charge, the District Court instructed the jury:

"In other words, the plaintiff, if it is entitled to recover, would be entitled to recover the amount by which its profits were reduced by the violation of the antitrust laws, if and to the extent that you find that there was such a reduction." (R. 1360).

No one will ever know what conclusion the jury reached on Utah Pie's market share "but for" respondents' violations; the damage verdicts may have included something on account of lost sales, reduced prices and injury to good will, in whatever proportions the jury deemed appropriate (R. 41-42, 1405-1406).

But if the jury did in fact find that Utah Pie would have had 66.5% of the market in Salt Lake City absent respondents' violations, it would certainly not constitute a monopoly of even that limited area. Utah Pie had no power to exclude others from selling in Salt Lake, or even building pie plants across the street from its own.

What Utah Pie did have was the benefit of long experience in the pie business, an advantageous location, a clean, efficient plant, a good product, and willing workers (R. 175, 505-506, 524, 971, 1115-1116). And the fact is that it *did* obtain 66.5% of the business in the immediate area of Salt Lake City until respondents swung into action with their "unnatural" pricing (Pl. Ex. 62; R. 437, 2323).

The Tenth Circuit's analysis of this case conflicts directly with the decision of the Fourth Circuit in *Maryland Baking Co. v. FTC*, 243 F.2d 716 (1957); cited with

approval in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 544, 80 S.Ct. 1267, 1272. There, the record showed that Maryland Baking had charged discriminatory prices in the marketing area of a small competitor with the result that the small competitor's market share had fallen from 91.3% to 58.2% (See FTC Docket No. 6327, 52 FTC 1679, 1682 (1956). The Fourth Circuit said:

> "There is evidence that the price cut was initiated for the purpose of driving the competitor out of business and that it deprived the competitor of . . . about half its volume of business in the product in question. The contention that petitioner's actions did not affect competition . . . is so lacking in merit as not to warrant discussion" (243 F.2d at 718).

The Fourth Circuit held that a decline from 91.3% to 58.2% market share hurt competition. The Tenth Circuit held that a drop from 66.5% to 45% could not. Utah Pie respectfully urges that the Fourth Circuit's analysis is correct, and the Tenth's is faulty. There is nothing strange about a local concern's having a large market share near its plant. So long as other sellers in neighboring geographic areas offer potential competition, and as long as entry is free, the local concern may well have a large portion of the local market without exercising any real control over pricing or entry.

The hallmark of the "monopoly" referred to in Section 2 of the Sherman Act is the power to exclude competitors or control price, or both. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 143, 68 S.Ct. 915, 922; *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 945; *American Tobacco Co. v. United States*, 328 U.S. 781, 809, 66 S.Ct. 1125, 1138-1139.

As this Court observed in *Griffith*, supra, "anyone who owns and operates the single theatre in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense. But he usually does not violate Section 2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under Section 1." (334 U.S. at 106; 68 S.Ct. at 945).

Utah Pie had the only pie plant in the intermountain area (R. 175, 482-483, 1115-1116). Its position was entirely analogous to the man "who operates a single theatre in a town". Respondents, by contrast, pose the real threat to competition, because they have demonstrated not only the ability but the willingness to sell at places and prices of their own choosing without regard to profit, or any other disciplining factor of the market place. Compare *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698. It could fairly be said that *respondents* had "the power to control prices or exclude competition." *United States v. du Pont & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005.

---

### 3. THE COURT OF APPEALS HAS IGNORED ALL OF THE CONTROLLING CLAYTON ACT PRINCIPLES IN REVERSING THE JURY IN THIS CASE.

After analyzing the facts of this case, the Court of Appeals concluded that respondents' regional price-cutting was unlikely to lessen competition or to tend to create monopoly, and that no jury should be permitted to so find. In arriving at that conclusion, the Court of Appeals

necessarily disregarded substantially every test which this Court has established for reviewing Clayton Act cases.

a. The Court of Appeals Ignored High and Apparently Growing Concentration in This Industry.

In the first place, the Court of Appeals ignored the surprisingly high concentration which has already been achieved in this new industry.[1] Respondents accounted for more than 66% of all "quality" pies sold in the United States in the year ending June, 1958 (Pl. Ex. 61; R. 436, 602, 2275, 2294). Continental was the largest single seller in the "price" pie category (Ibid.).

In respondents' study of the Salt Lake City Market, all "other" sellers combined (i.e. not parties to this action) had a maximum market share of 18.7% in 1959, which declined steadily thereafter to 8.2% in 1961—a share less than that of any single respondent (Pl. Ex. 62; R. 437, 2323).

Although there was testimony that there were 200 sellers of frozen pies in the United States (R. 1011) respondents' evidence showed only a dwindling handful who attempted to sell in Salt Lake City as respondents' discriminations there made competition progressively more difficult from 1959 to 1960 to 1961 (R. 794, 965). As D. Ex. A-27 (R. 893, 5824) shows, respondents were able to identify only 19 brands advertised at retail in Salt Lake City in the calendar years 1957 through 1961. Of these brands, 9 were packed by either petitioner or respondents (Ibid.). Of the remaining 10 identified brands,

[1] In this industry "entry," *at least into manufacturing as such*, is easy (R. 524, 1011). That fact only serves to make the high degree of concentration in the industry more ominous.

only 4 were advertised in both 1960 and 1961 (Ibid.). This almost total exclusion of competition from Salt Lake City is hard to explain on the basis of geographical factors. Petitioner had the only frozen pie plant in the intermountain area, to be sure, but respondents managed to blanket the United States with their frozen pies from a maximum of three pie plants each. The obvious inference is that petitioner remained in the Salt Lake Market only because it had to remain, and that respondents sold in that market at the low price level which their price discriminations had created for ulterior and monopolistic motives.

The Court of Appeals seemingly ignored this concentration in assessing the arguably probable effect of respondents' discriminations. Compare *United States v. Von's Grocery Co.*, 384 U.S. 270, 86 S.Ct. 1478, in which this Court found a merger resulting in a concentration of 7.5% of the business in the merger partners to be so obviously unlawful as to not merely justify a finding of illegality but to actually compel it.

In this case, the jury saw clearly the threat to competition which the Court of Appeals would not even let it consider. The Court of Appeals accepted, as if ordained by higher law, that respondents were "national" sellers and that Utah Pie was not (R. 1456, 1498). It nowhere stopped to consider how respondents became "national" sellers, or where Utah Pie's regional market might have extended in the absence of respondents' discriminations.

Compare *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 84 S.Ct. 1710, in which the possibility that a competitor would expand into a new market was held

sufficient to show potential injury to competition when such expansion was prospectively foreclosed by participation in a joint venture.

The Court of Appeals also ignored the *trend* toward concentration of the frozen pie business in Salt Lake (inferentially due to respondents' price discriminations). Compare *United States v. Pabst Brewing Co.*, 384 U.S. 546, 86 S.Ct. 1665, in which this Court held that "Congress, in passing Section 7 . . . was concerned with arresting concentration in the American economy, *whatever, its cause,* in its incipiency." (384 U.S. at 552, 86 S.Ct. 1669; emphasis added).

**b. The Court of Appeals Apparently Considered Each Respondent's Price Discriminations as If They Had Occurred in a Vacuum.**

The Court of Appeals apparently considered the pricing practices of each of the respondents in a vacuum, paying no attention to the fact that each respondent's discriminations occurred in a context of *similar discriminations by the other respondents.*

It is axiomatic that Section 7 merger cases (involving the same "incipiency" standards as must govern this case) are decided upon a review of all of the market factors, *including trends toward concentration through mergers of firms not parties to the suit,* or indeed trends toward concentration from any cause, whether identified or not. See *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552, 86 S.Ct. 1665, 1669 (1966).

It is equally clear that market behavior of parties not before the court can be considered in assessing the prob-

able competitive effect of tying contracts under Section 3 of the Clayton Act. Thus, in *Standard Oil Co. of Calif. v. United States*, 337 U.S. 293, 69 S.Ct. 1051, this Court observed:

> "In view of the widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, *evidence that competitive activity has not actually declined is inconclusive.*" (337 U.S. at 314, 69 S.Ct. at 1062; emphasis added)

There is no reason why the jury should not have considered, in assessing the discriminations of each respondent, the fact that competition in the market for frozen pies was already in great jeopardy as a result of the pricing practices of the other respondents.

**c. Discriminatory Price Cuts by a Major Competitor Injure a Competitor by Depressing Market Prices as Well as by Diverting Business.**

Local price cutting by a large competitor is likely to divert business to the discriminating seller, and this effect is relevant in assessing the impact of the discrimination. See e.g. *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir. 1945).

But local price-cutting also tends to force the local seller to meet the discriminatory price, and may result in his destruction even though he keeps the business, if the price is low enough. See e.g. *American Tobacco Co. v. United States*, 221 U.S. 106, 182, 31 S.Ct. 632, 648.

There is no reason in law or logic why the jury could not have considered the price-depressing effects of re-

spondents' discriminations as well as their business-diverting effects. And yet it is clear from the opinion of the Court of Appeals that the Court of Appeals did *not* consider this effect.

The Court of Appeals does not spell out its reasons for disregarding the price-depressing effects of respondents' discriminations. It simply assumes that respondents' prices were "meeting" each other's prices, or the prices of Utah Pie (R. 1464, 1481, 1482, 1492, 1499). In discussing the impact of respondents' pricing, the Court of Appeals talks only of its business-diverting aspects (R. 1463, 1471-1475, 1477-1478, 1483, 1500-1508).

The Court of Appeals also repeatedly emphasizes that Utah Pie's prices were the lowest in the market (R. 1469, 1470, 1486, 1489, 1491, 1499, 1501, 1502, 1505, 1507). Those statements are not a fair reflection of the record; Utah Pie's controlled "Frost 'N Flame" label was quite consistently lower than respondents' 24-ounce proprietary brands (as it was usually lower than Utah Pie's "Utah" brand) (D. Ex. A-35; R. 1065, 5827). But is was *not* always lower than Pet's "Swiss Miss" nor was it below Continental's "Morton" at the time when Continental was making massive sales at unheard-of low prices (Ibid.).

The legal fallacy is in assuming that a discriminatory price reduction *which does not undercut a competitor* cannot be unlawful, or at least cannot depress the competitor's price. The cases have repeatedly recognized that a "premium" brand, such as respondents' nationally advertised labels, may be in competitive equilibrium with lesser known brands at a substantially higher price. See

*FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 538, 80 S.Ct. 1267, 1269; *American Tobacco Co. v. United States*, 328 U.S. 781, 806, 66 S.Ct. 1125, 1137; *Gerber Products Co. v. Beech-Nut Life Savers*, 160 F.Supp. 916 (S.D.N.Y. 1958).

And the facts demonstrated it here. Although sales of Pet-Ritz, Simple Simon and Morton labels appear to have all been responsive to price, the market was far from being perfectly "elastic". At high prices those labels sold less, at low prices they sold more, but the range of price over which respondents could make some sales was substantial (D. Ex. A-35; R. 1065, 5827). The jury could have inferred that at non-discriminatory prices, respondents could have made some sales, and that when they decided to increase volume by discriminatory pricing, they not only diverted business but also reduced price levels generally.

---

**4. ALL RESPONDENTS ENGAGED IN SUBSTANTIAL PRICE DISCRIMINATIONS.**

Because the Court of Appeals ignored both the law and the evidence relating to "price," (and because it compared the wrong prices and the wrong marketing area) it was able to present a picture of minor, sporadic discriminations by respondents.

In fact, although their approach varied considerably, all respondents engaged in 2(a) price discriminations of significant proportions. Compare *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661 (6th Cir. 1965) cert. den. 382 U.S. 904.

Pet's principal weapon was the "Bel Air" private label which it sold in massive quantities throughout Utah Pie's trading area at a highly discriminatory price. (See Statement, *supra*, pp. 19-23, and Appendix B to this brief). Pet also sold large quantities of the proprietary "Swiss Miss", at sometimes discriminatory prices in Utah Pie's trading area and lesser quantities of its proprietary "Pet Ritz" at substantial discriminations in price. (See Statement, *supra*, pp. 24-26, and Appendix B to this brief).

Continental's brand was "Morton." Continental's sales in Salt Lake City itself were fairly small until 1961, but when Continental cut its price, it cut it to $2.55 per dozen ($1.28 per case), deeply below its lowest previous price, and deeply below the price of all of its competitors (R. 670-671; D. Ex. A-35; R. 1065, 5827, 5842). The result was a massive diversion of business to Continental; bulging warehouses for the buyers, weeks in which buyers strove to work off stocks purchased at Continental's sensationally low prices, and a dramatic decline in Utah Pie's prices (R. 695-696; 795; Pl. Ex. 93; R. 552, 4587).

Continental made substantial sales to other purchasers at discriminatory prices in other parts of Utah Pie's trading area, including Denver. (See Statement, *supra*, pp. 47-52, and Appendix C to this brief). Utah Pie tried, with very indifferent success, to get started in Oregon, Washington and Colorado (R. 531-542; R. 769-770, 775-788; Pl. Ex. 82; R. 527, 3616).

Carnation's only brand was "Simple Simon." (D. Ex. A-35; R. 1065, 5827). Carnation's discriminations in price were not, for the most part, as dramatic as Continental's

price raids in 1961 (See Statement, *supra*, pp. 34-41). But Carnation's price discriminations were chronic and substantial, and resulted in respectable volumes of sales for Carnation in Salt Lake City as well as in other parts of Utah Pie's trading area (Ibid.).

Utah Pie has set out the evidence showing respondents' discriminations in detail in its Statement, *supra*. Suffice it to say at this point that under the interpretation of the evidence which Utah Pie urged upon the jury, each respondent engaged in discriminations which resulted in very substantial sales of pies at low, discriminatory prices in Utah Pie's trading area, that these discriminations were essentially all in one direction during the relevant 1959-1961 period, and that they depressed prices in Utah Pie's trading area as well as diverting business from Utah Pie and "other" competitors to respondents.

**a. The Court of Appeals Ignored Both the Facts and the Applicable Law in Assessing the Extent of Respondents' Price Discriminations.**

A first step in any price discrimination case is to compare prices. In order to compare prices, one must first define what is meant by "price." In this case, the Court of Appeals compared what it called respondents' "absolute" prices, defined as follows:

> "By 'absolute price' is meant the list price, less any deals offered, *whether direct discounts from invoices or allowance for advertising.*" (R. 1488; see also R. 1461, 1467, 1485; emphasis added).

The Court of Appeals has thus treated respondents' advertising allowances in places outside Utah Pie's trad-

ing area as the exact equivalent of respondents' straight price cuts within Utah Pie's trading area. The effect of such treatment is to minimize the duration and extent of respondents' discriminations.

There is no warrant in the evidence in this case, and none in law, for the Court of Appeals' calculations of "price."

The unrebutted testimony of respondents' own executives was that an advertising allowance is *not* a price cut (R. 110-112, 160, 462, 687-689, 1030).

The law is to the same effect. Section 2(d) of the Robinson-Patman Act is the "advertising allowance" section of the Act. *Giant Food, Inc. v. FTC*, 307 F.2d 184 (D.C. Cir. 1962), cert. denied 372 U.S. 910; *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir. 1945), cert. denied 326 U.S. 774. The Courts of Appeal have repeatedly dealt with fact situations presenting claims under both 2(a) and 2(d) of the Robinson-Patman Act and have treated them as quite distinct offenses. See *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694 (9th Cir. 1964); *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962).

The distinctions between Sections 2(a) and 2(d) of the Robinson-Patman Act was expressly considered in *R. H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964) in which Macy's obtained from its suppliers allowances apparently intended to be used "solely" for the institutional publicity" of Macy's (326 F.2d at 449). The Second Circuit stated that "admittedly, it might be difficult to read the language of Section 2(d) to encompass a payment by a

vendor to a buyer who did nothing but put the money in his pocket; that would seem to be a Section 2(a) price discrimination." (326 F.2d at 449-450).

Here, there is no question of a purchaser's "putting the money in his pocket." The advertising allowances of all respondents were payable only upon later request upon proof that the respondent's product *had in fact been advertised* (R. 158-160, 689, 697, 1095). Conceding that an advertising allowance was an inducement which respondents used to help sell pies, there is no basis in fact or in law for treating advertising allowances as dollar-for-dollar offsets to the straight price cuts which respondents employed in Utah Pie's trading area.

Indeed, if the Court of Appeals could properly consider respondents' advertising allowances at all in this 2(a) case, it should also have considered the "service" which respondents provided their Utah area buyers in delivering pies into the Intermountain area at the same price which was offered to California buyers at their plant doors; it is not disputed that respondents' freight costs from their California plants to Salt Lake ran about $.30 to $.35 per dozen (R. 254, 663, 770).

Respondents all used delivered price systems, absorbing their freight costs in their delivered prices (R. 73, 451, 453, 740, 1028, 1173).

There is some authority for the proposition that freight absorption (and thus varying "mill net" prices) can give rise to a violation of Section 2(a) even though delivered prices paid by customers remain the same everywhere. See *FTC v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793;

*FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 65 S.Ct. 971; *Corn Products Ref. Co. v. FTC*, 324 U.S. 726, 65 S.Ct. 961; *Guyott Co. v. Texaco, Inc.*, _____ F.Supp. _____ (D. Conn. 1966) 1966 Trade Cases Para. 71,835.

But Utah Pie tried this case on the basis that while freight absorption may be important evidence of a seller's intent, price discriminations for purposes of Section 2(a) should be established by reference to *invoice net prices*, without reference to other factors such as advertising allowance, promotional assistance, freight absorption, or the like, which may be reachable, if unlawful, under other Sections of the law.

Whatever the possible difficulties in distinquishing between fake brokerage under Section 2(c) and straight price discrimination under 2(a)[8] there is no basis in law or logic for blurring the distinction between 2(a) price cuts and 2(d) advertising allowances. On the contrary, there is every ground for maintaining a careful division between the two types of conduct in view of the differing demands of the sections as to proof of "incipient" competitive injury, cost justification, etc. See *FTC v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 70-71, 79 S.Ct. 1005, 1014.

---

[8]Compare *Empire Rayon Yarn Co., Inc. v. American Viscose Corp.*, 354 F.2d 182 (2d Cir. 1965), with the *en banc* opinion in the same case (CCH Trade Reg. Rep. Para. 71841; petition for cert. filed, 35 U.S.L. Week 3140, No. 636), overruling the prior decision and concluding that a particular discount was a 2(a) price discrimination, if anything, and not dummy brokerage under 2(c).

**b. Respondents' Quantity Discounts Were Not Justified.**

All respondents used price schedules which incorporated substantial discounts of up to $.14 per case for "full truck" purchases (Pl. Ex. 8; R. 89, 2049; Pl. Ex. 16; R. 113, 2062; Pl. Ex. 41; R. 396, 2223; Pl. Ex. 64; R. 454, 2331; Pl. Ex. 65; R. 454, 2368; Pl. Ex. 66; R. 454, 2402; Pl. Ex. 76; R. 474, 2530).

Pet made effective use of its quantity discounts; it permitted Safeway to combine shipments of Bel-Air and Pet-Ritz pies so as to obtain the lowest "full truck" price on less-than-truckload shipments of Pet-Ritz (Pl. Ex. 46; R. 411, 2249, 2250; Pl. Ex. 47; R. 412, 2252, 2253; Pl. Ex. 121; R. 996, 5250).

At one point, Carnation was offering $1,000 in the form of a separate, off-invoice rebate in Seattle for purchases of full-truck quantities, with the privilege of combining fruit pies and cream pies to obtain the "full truck" price plus the rebate (Pl. Ex. 71; R. 458, 2522; Pl. Ex. 72; R. 458, 2524; Pl. Ex. 126; R. 1181, 5340). (For a time, Seattle buyers were receiving an advertising allowance in addition (Pl. Ex. 72; R. 458, 2254; Pl. Ex. 126; R. 1181, 5340).

There was no contention made that these quantity discounts bore any relationship to actual differences in costs of manufacture, sale, or delivery. Having failed to justify their quantity discounts in terms of cost, respondents may not complain if the jury considered price differences resulting in part from such discounts. *FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822. *United States v. Borden Co.*, 370 U.S. 460, 82 S.Ct. 1309.

In making price comparisons of respondents' prices, Utah Pie has used actual face-of-the-invoice prices where prices are evidenced by invoices. Where prices have been shown by reference to price lists, "full truck" (i.e. lowest) prices have been used to show prices in both high-price and low-price areas. Comparison based upon "ex warehouse" prices in the high-price areas as against "full truck" prices in low-price areas would show even greater price differences.

**c. Pet's Private-Label Discriminations Were Substantial, Sustained, and Posed a Serious Threat to Competition.**

During the relevant period of this case, Pet made all of the private-label "Bel-Air" pies purchased by Safeway Stores, except for a few pumpkin and mince pies (R. 517, 1150). The quantities involved were very substantial overall, and in Utah Pie's trading area. (Pl. Ex. 42; R. 1041, 1054, 2226, 2236; D. Ex. A-35; R. 1065, 5827, 5829-5832). The "Bel-Air" pies which Pet sold in Utah Pie's trading area were sold at prices greatly below the prices which Pet charged for its Pet-Ritz pies elsewhere. (See Appendix B). Pet's Bel Air and Pet-Ritz brands were stipulated to be of "like grade and quality." (R. 1373).

In *FTC v. Borden Co.*, 383 U.S. 637, 86 S.Ct. 1092, this Court held that discriminations between prices of proprietary brand goods and physically identical private label goods are cognizable under Section 2(a) of the Clayton Act. Consequently, there was an undoubted "discrimination" between the price which Pet charged for Bel Air in Utah Pie's trading area and the price which Pet charged for its proprietary Pet-Ritz pies, elsewhere.

The Court of Appeals dismissed the evidence of these discriminations on two grounds:

1. That Utah Pie would not have had the Safeway business in any event, and thus suffered no injury; (R. 1472, 1501) and

2. That Pet's lower price for the Bel Air pie was cost-justified within the meaning of the proviso of Section 2(a) of the Clayton Act (R. 1465, 1501).

The analysis is faulty on a number of grounds, both factual and legal.

In the first place, there was testimony that Utah Pie's "Utah" brand competed directly with the "Bel Air" brand for Safeway's business (Pl. Ex. 46; R. 411, 2249). The Salt Lake Division of Safeway Stores was free to stock Bel Air or other brands as it chose (R. 698, 707, 1138, 1146). It was also free to buy proprietary brand items (including Utah Pie's "Utah" label, Carnation's "Simple Simon") as indeed, from time to time, it did (R. 544, 698, 701, 707, 1126, 1138). Pet's Bel Air prices were usually below Utah Pie's prices for "Utah" brand (D. Ex. A-35; R. 1065, 5827, 5835, 5836, 5844). In 1961, Utah Pie's sales of "Utah" brand to Safeway declined in a growing market (R. 817).

If stores in the Salt Lake and Denver divisions of Safeway wanted to purchase Bel Air pies, they were obliged to purchase pies packed by Pet through Safeway's buyer at Safeway headquarters in California (R. 1138). He resold Bel Air pies to the Safeway Divisions substantially at his cost (R. 1141). Thus any discrimination in the prices which Pet charged to Safeway for Bel Air

pies had a direct and immediate impact upon the sales of other sellers competing against the Bel Air label for the business of the various Safeway Divisions (Pl. Ex. 46; R. 411, 2249).

In addition to diverting business from other sellers to itself, Pet's discriminatory pricing of the Bel Air pies undoubtedly tended to depress prices generally in Utah Pie's trading area (R. 715, 720, 724, 751, 815).

Furthermore, there was evidence that absent Pet's very substantial discriminations in Bel Air prices *vis a vis* Pet-Ritz, Utah Pie would have had some of the Bel Air fruit pie business (other than pumpkin and mince) directly. There was testimony that Utah Pie was in all essential respects qualified to pack for Safeway (R. 175, 476-477, 486, 505-506, 524, 936-937; Pl. Ex. 38; R. 386, 2212). Alan Young, the Safeway buyer, said that he was not satisfied with Utah Pie's quality control (R. 1139), but his testimony is flatly contradicted by the evidence that Safeway's inspectors were eminently satisfied with Utah Pie's plant and product (R. 497) and that Young had himself told Utah Pie's sales manager that Utah Pie could have some of the Bel Air business and that he should go out and buy fruit to fulfill the contract (R. 547-549).

Finally, the Court of Appeals was mistaken in holding that as a matter of law the jury was required to find Pet's price discriminations on the Bel Air brand cost-justified, as more fully discussed *infra*.

To a certain degree, Pet's Bel-Air pies packed for Safeway undoubtedly competed with its own proprietary

brands, when they were sold in the same markets. But Bel-Air sold in Utah clearly did not compete with Pet-Ritz sold in Northern California, and Pet did not need to worry about adverse effects of low Bel-Air prices in Utah upon its Northern California sales of Pet-Ritz pies. With Bel-Air and Swiss Miss both selling strongly in Utah Pet could, and apparently did, let its Pet-Ritz sales dwindle without losing its strong market position in Utah (Pl. Ex. 62; R. 437, 2323).

Thus, although Pet-Ritz outsold Swiss Miss nationally in 1960 and 1961 (Pl. Ex. 21; R. 235, 2161, 2165) and although Pet sold roughly the same volume of Bel-Air and Pet-Ritz pies in its 1961-62 fiscal year (Pl. Ex. 43; R. 406, 2243; Pl. Ex. 44; R. 407, 2247) its ratio of sales in Salt Lake was very different:

**Salt Lake Pet-Ritz Sales as % of Bel-Air Sales**

| 1959 | 1960 | 1961 |
|---|---|---|
| 55.6% | 36.2% | 25.4% |

(Computed from Pl. Ex. 62; R. 437, 2323).

**d. Respondents Discriminate Without Statutory Justification at Their Peril.**

Respondents should have adhered to a "one-price" policy, absent their ability to prove either a cost justification, or a "good faith meeting of competition" defense, or a "changing conditions of the market" defense.[9]

---

[9]This latter proviso of Section 2(a) reads

"*And provided further*, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to

Faced with the necessity of charging a single price everywhere (unless a special justification for a difference existed) respondents would have had to decide whether to raise their price-war prices in Utah Pie's trading area or give their other customers outside of Utah Pie's trading area the benefit of the same prices as they were charging in competition with Utah Pie. They probably would have compromised, giving buyers in respondents' high price area some price relief, and relieving sellers attempting to participate in the Intermountain Market of ruinous, below-cost, destructive competition.

In April of this year, this Court upheld New York's statute designed to assure to its citizens the lowest prices at which liquor is sold in any part of the United States. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 382 U.S. 924, 86 S.Ct. 10. Although states might lack the power to enact similar legislation with respect to commodities other than liquor, the policy behind the statute is clearly reasonable. Compare *La Peyre v. FTC*, ___ F.2d ___ (5th Cir. 1966); CCH Trade Reg. Rep. Para. 71,881.

---

actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

It has been understood, and held, to refer only to "situations 'similar' to the unloading of seasonal and obsolescent or perishable and deteriorating merchandise, or forced sales compelled by judicial process or discontinuance of a merchant's business line." Att'y Gen. Nat'l Comm. Antitrust Rep. 178, citing *Moore v. Mead Service Co.*, 190 F.2d 540 (10th Cir. 1951).

**5. EVIDENCE OF INTENT TO DESTROY A COMPETITOR SUPPORTS A JURY FINDING OF AN INCIPIENT THREAT TO COMPETITION.**

One sure way to eliminate competition is to eliminate one's competitors. And one good way for a large, diversified corporation to eliminate a specialized, regional competitor is by regional price-cutting in the specialized competitor's products. (See *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543, 80 S.Ct. 1267, 1271).

In assessing the probability that a regional price-cutter's price discriminations will actually have adverse effects upon competition, a jury can properly look to the discriminating seller's intent, since "the actor is better able than others to judge the practical possibility of achieving his illegal objective." *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir. 1964), cert. denied 377 U.S. 993. See also *Brown Shoe Co. v. United States*, 370 U.S. 294, 329, 82 S.Ct. 1502, 1526, noting the importance of "intent" in assessing the probable effects of a merger under Clayton Act standards. Compare *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 75 S.Ct. 148; *Lorain Journal v. United States*, 342 U.S. 143, 153, 72 S.Ct. 181, 186; *Swift & Co. v. United States*, 196 U.S. 375, 396, 25 S.Ct. 276, 279; *Alles Corp. v. Senco Products, Inc.*, 329 F.2d 567, 572 (6th Cir. 1964).

The importance of "intent" in cases under Section 2(a) of the Clayton Act was summarized by the Ninth Circuit in *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 369 (1955), cert. denied 350 U.S. 991 when it said:

> "Of course, intent is not an essential factor to a §2(a) violation, although, if the intent to destroy

were found to exist, it might tend to render the injury probable."

In assessing the probable effects of respondents' price discriminations in this case, the Court of Appeals has closed its eyes not only to respondents' own direct expressions of their intent but to a panoply of predatory practices previously held to evidence intent. This evidence of predatory intent, together with the fact of respondents' discriminations, was more than ample to take Utah Pie's case to the jury as against each respondent.

**a. Discriminatory Low Prices Charged by Respondents at Places Distant From Their Plants Are Evidence of Predatory Intent.**

Under conditions of perfect competition, sellers charge the market price in effect when and where their goods are sold. Goods flow through the channels of trade to their ultimate destinations in other parts of the country, wherever their price-plus-freight is competitive. See Joan Robinson, Economics of Imperfect Competition, 179 (London, 1934).

As imperfections creep into the market, sellers begin to be able to "administer" their prices, by charging different prices for the same goods at the same time and place, or by selling at delivered prices involving freight absorption or "phantom" freight. See e.g. *FTC v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793; *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 65 S.Ct. 961; *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 65 S.Ct. 971.

In this case, respondents "force fed" their pies into Utah Pie's trading area with delivered prices which neces-

sarily entailed substantial freight absorptions of $.30 to $.35 a dozen (on a product usually priced at around $4.00 per dozen) just to sell pies at the same price in Salt Lake as they sold at the doors of their California plants (Pl. Ex. 28; R. 261, 2184; R. 254, 663, 770).

Respondents jointly hired Dr. Anderson as an economics expert (R. 1087). He testified, on cross-examination, that lower prices at points distant from a respondent's plant were "unnatural" (R. 1130). He said that in these circumstances declining prices in Salt Lake were the result of predatory pricing as "one of the possibilities" (R. 1115).

**b. Sales at a Loss Are a Classic Predatory Practice, Intentionally Engaged in by All Respondents.**

Sales at a loss are a classic method employed by financially powerful sellers to eliminate weaker competitors and achieve monopoly. See *United States v. American Tobacco Co.*, 221 U.S. 106, 160, 31 S.Ct. 632, 641; *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944).

Sales at a loss certainly give rise to a permissible inference of an intent to injure or destroy competitors. Dr. Anderson, respondents' economic expert, testified that sales by a large corporation at a loss in a regional market, where that loss was planned in advance, would be evidence of some ulterior motive (R. 1122-1124).

> "Furthermore, it would ignore the economic facts of life to say that one in business for a profit would deliberately and consistently sell at a loss without some ulterior motive." *Ben Hur Coal Co. v. Wells*, 242 F.2d 481, 486 (10th Cir. 1957), cert. denied 354 U.S. 910.

Pet and Carnation both planned their losses on frozen pies in advance. (In regard to Pet, see R. 397, 400-401; Pl. Ex. 7; R. 409, 1926; Pl. Ex. 7A; R. 409, 2047; Pl. Ex. 7B; R. 409, 2048; In regard to Carnation, see R. 441-442, 443-445; Pl. Ex. 5; R. 446, 1656).

Pet's program of intentional, prolonged below-cost sales of frozen pies was financed with money "borrowed . . . from our total corporation operation" (R. 1019). This practice was euphemistically referred to as "investment spending" (R. 400-401, 1019):

> "Q. Selling at a net loss over a substantial number of years in order to establish a franchise in the market places? That's correct?
>
> "A. Right." (R. 1050-1051).

Since Pet's overall business was profitable, its losses on pies were financed with $.50 "tax" dollars (Pl. Ex. 7; R. 409, 1926). Pet's pattern of actual losses on frozen pies is shown by Pl. Ex. 21 (R. 235, 2161).

Continental's explanation for its below-cost selling was that it was a "contribution to profit" (R. 126, 638-642; see also R. 246, 675). On cross-examination, the accounting manager of Continental's Morton Division (R. 644) testified that too many of these "contributions" to profit would put a company in bankruptcy (R. 641). Continental's losses were admittedly financed in part with "tax dollars" (R. 641).

Carnation likewise embraced the "contribution to profit" theory (R. 1334). In the years 1959, 1960, 1961, Carnation's Frozen Foods Division lost $141,413 in the Pacific Northwest and Mountain States (i.e. petitioner's

trading area) but made $252,554 in Northern California (Pl. Ex. 22; R. 241, 2167). During those same three years, Carnation's overall profits before taxes were $65,484,058 (Pl. Ex. 31; R. 256, 2202). Although Carnation's entire Frozen Foods Division lost money in 1960 and 1961, the losses in the Pacific Northwest and Mountain States were out of all proportion to losses elsewhere (Pl. Ex. 26; R. 378, 2180):

**Carnation Sales Volumes and Losses**

| Year | Utah Pie's Trading Area | | All Other Divisions | |
|---|---|---|---|---|
| | Case Sales | Loss | Case Sales | Loss |
| 1959 | 227,954 | $16,547 | 1,769,153 | $ — |
| 1960 | 392,167 | 78,245 | 2,253,357 | 126,534 |
| 1961 | 349,195 | 46,621 | 2,003,982 | 21,864 |

(Source: Pl. Ex. 26; R. 378, 2180)

Carnation's long-continued losses in Salt Lake were not a result of any inadvertence or of any random, *ad hoc*, deviation from non-discriminatory pricing to meet sudden or transitory circumstances. They were the result of a carefully calculated zone pricing system controlled directly from the highest policy levels of Carnation—a committee of the Board of Directors (R. 1180, 1197).

It is conceivable that a businessman might innocently sell below cost for a time through inadvertence, or that he might be temporarily forced to a price below his cost by competitive exigencies in his home market. But this record would not have supported such an inference as to any respondent's intent even if the jury had been persuaded to draw it. The evidence shows, indeed, that each respondent reached out many hundreds of miles from its nearest

plant to sell at discriminatory prices, intentionally below each respondent's cost, in an area where only petitioner had a plant.

Respondents' conduct is not merely compelling evidence of their intent. It is in and of itself subversive of the purposes of Section 2 of the Clayton Act, reaffirmed in the Robinson-Patman Act. The opinion of the Tenth Circuit holding that it could not reasonably be expected to adversely affect competition cries out for repudiation by this Court.

It is no defense, even under the strict standards governing the application of criminal statutes, that sales were merely below "fully distributed" costs, not "direct" costs. See *National Dairy Products Corp. v. United States*, 350 F.2d 321, 329-330 (8th Cir. 1965), vacated and remanded on other grounds, ——— U.S. ———, 86 S.Ct. 1913.

The Court of Appeals concedes that Continental sold below fully distributed costs, and at times even below direct costs (R. 1483). It says, however, that "had Continental been able to develop a substantial volume of sales in such market, it no doubt would have been able to realize a profit after overhead was charged." (Ibid.).

There are two things wrong with that argument. First is that Continental *did* "develop a substantial volume of sales" in 1961 by vigorous price cutting, but did not recover its costs (Pl. Ex. 62; R. 437, 2323, 2326). Second is that Continental did not itself manufacture the pies which it shipped from Watsonville, California, into Utah Pie's trading area. They were manufactured by another

packer and sold to Continental (R. 115-117; Pl. Ex. 17; R. 117, 2068). The contract under which they were packed provided that Continental would pay for material cost plus $.50 per dozen to cover "labor, overhead and profit" (Pl. Ex. 18; R. 121, 2154, 2155; see also R. 767).

Thus Continental could not hope to spread the overhead of *manufacturing* pies at Watsonville to its own advantage—the contract packer received $.50 per dozen in any event, and the profit, if any, was his. Continental could not, and did not, prove that there was any price at which it could sell sufficient volumes of frozen pies in the Utah trading area to recoup its cost of purchasing, delivering and selling them, or that it reasonably expected to make money on that business on a fully-allocated cost basis.

**c. Utah Pie Was the Principal Target of Pet's and Continental's Discriminations as Shown by Direct Evidence.**

**(i) Continental's Discriminatory Prices Were Admittedly Aimed Directly at Utah Pie.**

Continental's discriminatory low prices ($2.55 per *dozen;* $1.275 per *case*) were aimed directly at the petitioner; Morton's vice-president in charge of production admitted it on the stand (R. 86, 121). So did Morton's regional sales manager; he had said that Morton's lowest price in Salt Lake "was aimed at him [Utah Pie] as a competitor to get business in his customers' account" (R. 671). Indeed, he testified that the *only* time he had ever suggested lowering a price to meet competition was to meet Utah Pie's competition; he never made such a suggestion with reference to Pet or Carnation's Simple Simon (R. 672).

Continental's $2.55 price for a dozen apple pies in June of 1961 was below even the bare cost of production and sale (Pl. Ex. 29; R. 268, 2187). It was the lowest price which had ever been seen in the Utah market (D. Ex. A-35; R. 1065, 5827). Making allowances for Continental's other costs, there were losses continuously from late 1958 on Continental's frozen pie sales in the Salt Lake area (Pl. Ex. 29; R. 268, 2187; see also R. 127, 246, 636-641, 673).

Continental's explanation for the $2.55 price (rejected by the jury) was that it was an attempt to meet Utah Pie's price on an ounce-for-ounce basis (R. 199-201, 693-694). In fact, that "meeting" of Utah Pie's price was with a price of $2.55 against $3.10 on Utah Pie's *private label* "Frost 'N Flame" (R. 199-201). And the evidence was clear that neither the wholesale nor the retail price of 8" frozen pies was necessarily proportional to the number of ounces in the pie (R. 167-168, 682, 702-703, 824-827, 1103). Halgren, Vice President and director of Carnation, said "weight alone doesn't make all the difference" (R. 1208).

**(ii) Pet's Discriminatory Prices Were Aimed at Utah Pie.**

Pet's "investment spending" program was aimed in part at petitioner, as shown by a memorandum from Pet's files. Pet's intermountain area sales manager stated, under "Unfavorable Factors Affecting Results", that "despite our steady growth generally there are factors at work thatd ffi holes in our operation. Utah Pies in the Salt Lake District are a constant 'check' on our growth." (Pl. Ex. 37; R. 385, 2210).

Pet also recognized that sales of Bel-Air pies to Safeway would have an effect upon Safeway's purchases from other producers. In a draft of a proposed letter to salesmen, a Pet executive wrote, under "Favorable Factors" relating to the Safeway contract:

> "2. From a sales standpoint, we have gained sales volume from several Safeway Divisions that heretofore were stocking and promoting brands other than Pet-Ritz. This new business, of course, is under the Bel-Air label; *nevertheless, the sales of competitive brands have been restricted.*" (Pl. Ex. 46; R. 411, 2249; emphasis added).

Other Pet documents, however, showed that Pet was not interested in "hard" competition with Carnation's Simple Simon; internal memoranda show Pet's decision not to meet Simple Simon "deals" on various occasions (Pl. Ex. 49; R. 414, 2256; Pl. Ex. 50; R. 416, 2257). Other Pet memoranda showed Pet's awareness of substantially identical pricing with Simple Simon, and conscious effort by Pet to "accomplish" the identity (Pl. Ex. 52; R. 418, 2258).

**(iii) Industrial Espionage Is a Common Concomitant of Monopoly and Evidence of Predatory Intent.**

In June 1960, at a crucial moment in Utah Pie's negotiations for a piece of the Safeway private label business, Pet sent a spy through Utah Pie's plant. (R. 483-484, 487-492, 547-549, 921-941, 957). The spy was the Pet's frozen foods production manager, later General Manager of Pet's Frozen Foods Division, in the guise of a "frozen food broker for the Northwest." (R. 547). Pet's spy made a report for the use of Pet's contract sales manager, then

negotiating with Safeway, to be used by him in disparaging Utah Pie to Safeway. (Pl. Ex. 38; R. 386, 2212; R. 934-935, 960). Copies of the spy's espionage report were circulated to Pet's Senior Vice President, the President of Pet's Milk Products Division and the Vice-President in charge of production for Pet's Milk Products Division (R. 933). Pet got the Safeway business; Utah Pie did not (R. 549-550, 952-953, 1150). Some of the matters which the spy had reported to Pet were later mentioned to Utah Pie by Safeway (R. 492).

The Court of Appeals said of this evidence:

> "Of course, Pet's conduct was reprehensible and is not to be condoned. However, the information contained in Dittman's report was never conveyed to Safeway personnel. Dittman so testified, and so did Young, Safeway's buyer. It thus appears that the Dittman report was never used by Pet in its competitive efforts with Utah Pie" (R. 1476).

But Pet's conduct was more than just "reprehensible," whether or not Pet's espionage report was ever "used." It was evidence reinforced by other evidence (such as planned loses, fighting brands, and direct expressions of intent) that Pet planned and intended to acquire monopoly power, and intended to cripple or destroy Utah Pie in the process.

Industrial espionage, in various forms, has been a common implement for the effectuation of anti-competitive schemes for many decades. See *United States v. General Motors*, 384 U.S. 127, 86 S.Ct. 1321, 1326; *American Tobacco Co. v. United States*, 147 F.2d 93, 113 (6th Cir. 1944), affirmed 328 U.S. 781, 66 S.Ct. 1125; *Standard Oil*

*Co. v. United States*, 221 U.S. 1, 43, 31 S.Ct. 502, 509; *United States v. General Electric Co.*, 82 F. Supp. 753, 901 (D. N.J. 1949).

The evidence of Pet's industrial espionage gives rise to a permissible inference of predatory intent, and supports the jury's verdict.

The Court of Appeals, however, did not look at this evidence of predatory intent in the context of the other evidence in the case. Instead, it "tightly compartmentalized" the incident and "wiped the slate clean" after scrutinizing it, in direct defiance of this Court's admonitions in *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410.

**(iv) Pet Employed the Swiss Miss as a "Fighting Brand" in Utah Pie's Trading Area.**

Another predatory tactic which Pet employed was its "fighting brand", Swiss Miss. The Swiss Miss Pie was 4 ounces lighter than the Pet-Ritz and Bel Air brands, and sold at substantially lower prices (R. 1323; D. Ex. A-35; R. 1065, 5827). However, since the public ordinarily can't tell the difference between various weights of 8 inch pies (R. 879, 881, 1103), large quantities of underweight Swiss Miss were sold to unsuspecting buyers. The purpose of the Swiss Miss was to meet price competition which was the economy pie factor of the market, and "these generally speaking are the regional pies" (R. 1056). Pet employed Swiss Miss in Salt Lake with a vengeance; although Pet-Ritz had larger sales volume than Swiss Miss nationally (R. 438), Swiss Miss outsold Pet-Ritz almost 13 to 1 in Salt Lake in 1961 (Pl. Ex. 62; R. 437, 2323).

The "fighting brand" or "bogus independent" is a familiar device used by the monopolist as a weapon against weaker competitors. It has the advantage of protecting the price identification of the monopolist's regular brand or brands while forcing competitors to ruinously low price levels. See e.g. *Standard Oil Co. v. United States*, 221 U.S. 1, 43, 31 S.Ct. 502, 509.

---

**6. THE COURT OF APPEALS INVADED THE JURY'S PROVINCE BY ACCEPTING AND RELYING UPON CONTROVERTED EVIDENCE AND INFERENCES UNFAVORABLE TO UTAH PIE.**

The Court of Appeals clearly invaded the province of the jury in at least two distinct ways. In part, it simply ignored important facets of Utah Pie's evidence, and reasonable inferences which support the verdicts. It also accepted and relied upon, as proven fact, evidence and inferences unfavorable to Utah Pie.

Utah Pie has attempted to present the evidence and inferences which *support* its case elsewhere in this brief. That discussion sets forth the evidence which Utah Pie contends the jury could have credited and the inferences which it contends the jury could properly have drawn.

What follows deals with inferences and conclusions reached by the Court of Appeals after it had re-weighed and interpreted the evidence to support its opinion overturning the jury's verdicts. In this case, the Court of Appeals has this Court's injunction that antitrust cases must be left to the decision of the jury where ". . . motive and intent play leading roles . . . and hostile witnesses

thicken the plot." *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S.Ct. 486, 491.

The Court of Appeals has also repeatedly violated the well-considered rulings of this Court and of the Circuits (in particular, the Second Circuit) holding that even uncontradicted witnesses need not be believed. *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 19 S.Ct. 233; *Quack Ting v. United States*, 140 U.S. 417, 11 S.Ct. 733; *NLRB v. Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952); *Broadcast Music Co. v. Havana Madrid Restaurant Corp.*, 175 F.2d 77 (2d Cir. 1949).

It is not for an appellate court "to weigh the evidence or to determine the credibility of witnesses". *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469. It is up to the jury to decide what weight *if any* to give to the evidence. *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620, 628, 64 S.Ct. 724, 729 (1944).

This Court has said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error occur. But where, as here, there is an evidentiary basis for the jury's verdict, the *jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion*" (*Lavender v. Kurn*, 327 U.S. 645, 653, 66 S.Ct. 740, 744; emphasis added).

See also *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 80 S.Ct. 173; *Ellis v. Union Pac. Ry. Co.*, 329 U.S. 649, 67 S.Ct. 598; *Gunning v. Cooley*, 281 U.S. 90, 50 S.Ct. 231.

This Court recently said, in holding the evidence in a private antitrust action sufficient to go to a jury:

> "Undoubtedly, all of the evidence during this period does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts'. Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35 . . ." (*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-701, 82 S.Ct. 1404, 1411).

Here, the Court of Appeals stated that the evidence in the case is "free from substantial dispute, except for a few statements of opinions or conclusions not based on any substantial underlying proof" (R. 1454).

Aside from the fact that that statement is not true, it demonstrates that the Court of Appeals has completely misconceived both the record and its scope of review of the record. Some examples of particular ways in which the Court of Appeals has invaded the jury's province follow.

It is true that some of the evidence in this case was substantially undisputed, as far as it went. All parties accepted defendants' exhibit A-35 (R. 1065, 5827) as essentially accurate *for the sales which it covered* (i.e.

sales through particular wholesalers in Salt Lake City and Boise—R. 1116, 1117).

But Utah Pie never conceded that its case was limited to the sales chronicled in defendants' exhibit A-35. On cross-examination, Dr. Anderson, defendants' expert who prepared the exhibit, testified that Denver, Washington, Oregon, Northern Idaho, Montana, Wyoming and Nevada, while within Utah Pie's competitive trading area, were not included in his study (R. 1116). He said these other parts of Utah Pie's trading area could easily have been included in his study, but that it was not part of his assignment (R. 1116, 1117).

As to Utah Pie's sales in other parts of its trading area, there was no substantial doubt; the Utah Pie invoices were all tabulated (Pl. Ex. 4; R. 67-69, 1530).

None of the respondents denied price discriminations "from time to time" (although all denied violating any law) and they asked for instructions to that effect (R. 1426; see also R. 278).

But beyond that, the questions were strictly matters of inference:

—Where prices were shown by price lists and deal sheets, was there other evidence (testimonial or documentary) from which the fact of sales at those prices could be inferred?

—What was the extent of respondents' sales at discriminatory prices in other parts of Utah Pie's trading area not covered by defendants exhibit A-35 (R. 1065, 5827)?

—What was the impact upon general price levels of respondents' price discriminations in other parts of Utah Pie's trading area?

—What was the effect of respondents' discriminatory pricing upon volumes of sales of Utah Pie (and other sellers) in the various parts of Utah Pie's trading area?

—What was the intent and purpose motivating respondents' pricing practices?

—And where, in terms of competition and monopoly, were their pricing practices likely to lead?

These were jury questions, ably argued by respondents' counsel, who gave their clients the benefit of every doubt (R. 1282, 1310, 1329). But once decided, these questions were beyond the power of the Court of Appeals to re-examine. U.S. Const. Amend. VII. As this Court said in *Stone v. New York, Chicago & St. Louis R.R. Co.*, 344 U.S. 407, 409, 73 S.Ct. 358, 360:

> "The fact that fair-minded men might likewise reach different conclusions on this branch of the case emphasizes the appropriateness of also leaving it to the jury."

**a. The Tables Appended to the Court of Appeals' Opinion Conflict With Other Evidence and Inferences in the Case.**

The Court of Appeals' opinion concludes with a series of supporting charts and tables (R. 1513-1525). Some were prepared by the Court of Appeals based upon its interpretation of the evidence (R. 1467, 1468, 1470, 1488, 1489). One is simply a Continental exhibit, adopted without apparent change (Compare R. 1522 with D. Ex. M-22; R. 643, 5450). All of the appendices involved a selection and

arrangement of statistical information in a manner unfavorable to Utah Pie, and sometimes downright misleading.

Appendix I purports to show a high proportion of Utah Pie's sales concentrated in Utah and Idaho (R. 1513). By limiting its examination to the apple flavor, however, the Court of Appeals has excluded some 17,500 cases of pumpkin and mince pies sold by Utah Pie in Denver in 1959, and the substantial quantities of other flavors sold by Utah Pie in other portions of its trading area (R. 531; Pl. Ex. 82; R. 527, 3616).

Appendix II purports to show *offering* prices rather than selling prices. To be sure, all respondents relied upon their offering prices to show sale prices, and Utah Pie does, too, in instances in which there is evidence to show that some sales were in fact made. But Utah Pie relies also upon the evidence that sales tend to be made during periods of low prices, and not in the intervening intervals of high prices (R. 620). Thus offering price figures (i.e. price lists and "deal" sheets) must be considered with a degree of caution which the Court of Appeals has clearly not exercised.

**b. The Court of Appeals Has Failed to Make Any Distinction Between Wholesale and Retail Market Areas for Pies.**

The factual preamble to the Court of Appeals' opinion contains this statement:

> "The six western States of California, Washington, Oregon, Utah, Arizona and Colorado embrace a portion of the Inter-Rocky Mountain and West Coast regions. In each of such states there are one or more separate and distinct frozen pie market areas, which

comprise a large metropolitan center and the territory closely adjacent thereto. There are distinct frozen pie market areas in Los Angeles, San Francisco, Seattle, Portland, Spokane, Salt Lake City, Phoenix and Denver. The periphery of each of such market areas is nearly the same as that of the area in which its metropolitan newspapers circulate, that, because retail advertising is the lifeblood of the frozen pie industry and crucial to volume sales. The current retail price in a particular market area at a particular time is generally fixed by the prices at which the chain stores and cooperative grocery organizations advertise their frozen pies in the Thursday and Friday editions of the local newspapers, published and circulated in that market area." (R. 1455-1456).

Nowhere does the Court of Appeals distinguish retail market areas, described in this portion of its opinion, from the market areas of manufacturers, who sell to the wholesale level of distribution. (Compare R. 727-728).

By its unwarranted assumption that the "market areas" in issue in this case were those defined by retail advertising, the Court of Appeals has rejected the voluminous evidence that Utah Pie's marketing area, as a manufacturer, was the entire Intermountain and Pacific Northwest portion of the United States (R. 524, 528-529, 531, 778, 1115-1116; Pl. Ex. 82; R. 527, 3616; Pl. Ex. 91; R. 551, 4420).

**c. The Court of Appeals Accepted Pet's Controverted Evidence on the Safeway Contract.**

The Court of Appeals holds that even if Pet had not sold Bel Air pies to Safeway, Safeway "would not have

purchased them from Utah Pie, for reasons other than price, fully set forth in the factual statement" (R. 1501).

In its "factual statement in the Pet appeal" the Court of Appeals said:

> "We have shown Pet's share of the market, with Bel Air frozen fruit pies excluded, in 1959, 1960 and 1961, because it was clearly established by uncontradicted and uncontroverted evidence that Safeway was not willing in those years to purchase frozen fruit pies from Utah Pie, for the reason that it was unable to persuade Utah Pie to install means and procedures that would insure uniform quality of Bel Air frozen fruit pies produced by Utah Pie and sold by it to Safeway" (R. 1472).

The Court of Appeals' statement ". . . clearly established by uncontradicted and uncontroverted evidence . . ." is nothing short of fantastic. The credibility of Pet's witnesses on this subject was one of the fundamental issues in the case; Pet counsel commenced his argument to the jury with these words:

> "Mr. Lamb: May it please the Court, ladies and gentlemen of the jury:
>
> "In my entire 30 years of law practice, I have never had one of my witnesses accused of being a liar. Three of my witnesses were accused by the opposition of being a liar—the head buyer for the Safeway Stores, the president of the Milk Products Division of Pet Milk Company, Mr. Dittman, chief contract officer for the Pet Milk Company—who sat on this witness stand and were brought here by me as my witnesses.
>
> "Ladies and gentlemen, you observed the demeanor of these people, and I ask you to be the judge as to whether they told a lie or they didn't tell a lie.

"I brought Mr. Alan Young here, the chief buyer for the Safeway Stores, so that you could get the truth. He sat on that witness stand and told you that he never offered a fruit contract to Mr. Gaylen Rigby. He told you that he did not tell Mr. Gaylen Rigby to go out and buy apple." (R. 1310).

And what did Gaylen Rigby say, under oath? He said:

"Q. At this time had Safeway given you any direction? State whether or not Safeway had given you any direction with respect to whether or not you would pack pies for Safeway.

"A. They gave us their formulas.

"Q. When?

"A. When I was in San Francisco in June.

"Q. In other words, two days before this visit, approximately, as you have identified it.

"A. Yes.

"Q. They gave you the formulas and what else?

"A. He told us to purchase fruit to manufacture —we told him that the crop was coming in for certain items of fruit and, to obtain a decent price on fruit, we always buy—contract our fruit ahead. And he said for us to contract fruit for his pies. We did so.

"Q. Based upon that direction from Safeway, did you in fact go out and buy fruit to pack the Bel Air fruit pies?

"A. Yes, sir." (R. 549).

Young was asked whether the Gaylen Rigby's testimony was true or false. He said "it is false" (R. 1139).

Young, the Safeway buyer, did indeed testify that he was unsatisfied with Utah Pie's quality control (R. 1139).

But there was direct testimony that Utah Pie's quality control *did* satisfy the Safeway inspectors, and that Utah Pie could easily and cheaply install all the equipment required to pack for Safeway (R. 486, 492). Pet's industrial spy admitted on the stand that all of the points that Safeway required in its packers' operations which were lacking in Utah Pie's plant could easily be remedied in the event that Utah Pie secured a Safeway order (R. 936).

A Safeway quality control inspector who inspected Utah Pie's plant said it was the cleanest plant he had ever been in (R. 497). Alan Young, however, testified that Safeway's quality control inspector was "not qualified to say that" (R. 1157). He explained that the quality control inspector in question had just been sent to the Utah Pie plant to be "educated" (R. 1158).

The conflicts between Young's testimony, that of the Pet executives who dealt with him, and Pet's internal memoranda memorializing their conversations, are dealt with in Utah Pie's discussion of industrial espionage, *supra*, pp. 28-31, 103-105.

Suffice it to say that the bitterest evidentiary conflicts in the case revolved around the precise issue which the Court of Appeals found to be established (adversely to Utah Pie) by "uncontradicted and uncontroverted" evidence.

**d. The Jury Was Not Required, as a Matter of Law, to Accept Pet's Cost Justification for the Discriminatory Bel Air Price.**

The Court of Appeals held, as a matter of law, that the reduced price at which Pet's Bel Air pies were sold "was fully justified by the reduced costs of manufacture, sale

and delivery" (R. 1501; see also R. 1465). It held that the jury was required to believe the "cost justification" evidence, which Pet had agreed to create in order to obtain and retain the Safeway private label business (See Pl. Ex. 42; R. 1041, 1054, 2226; Pl. Ex. 43; R. 406, 2243; Pl. Ex. 44; R. 407, 2247, 2248), or the Controller of Pet's Frozen Foods Division (R. 380, 903-906), or both.

Inasmuch as Pet was in the best position to know its true costs, it had the burden of coming forward with convincing evidence that its self-serving statements about cost-justifying the Bel-Air business were true. "The burden of justifying a price differential ought to be on the one who 'has at his peculiar command the cost and other record data by which to justify such discriminations.'" *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 79, 73 S.Ct. 1017, 1027. See also *United States v. Borden Co.*, 370 U.S. 460, 82 S.Ct. 1309.

The only documents purporting to show any cost justification were attachments to a letter from Pet to Safeway dated January 6, 1960 (Pl. Ex. 42; R. 1041, 1054, 2226, 2238) and some computations purporting to cover Pet's fiscal year 1961-1962 contained in Pl. Exs. 43 and 44 (R. 406, 2243; 407, 2247, 2248). Pet's 1961-1962 fiscal year began April 1, 1961 (R. 915).

Thus there is a hiatus in documentary material from January 6, 1960 through March 31, 1961—almost 1¼ years of sustained discriminations (See Appendix B).

And Pet offered no testimony to explain how the cost differences in Pl. Exs. 42, 43 and 44 had been determined. The Controller of Pet's Frozen Foods Division made some

conclusionary statements to the effect that Pet "proved" a cost justification:

> "A. The law says that you cannot give preferential treatment to one customer over the—our regular customers. In the case of our private label business, we cannot give preferential price treatment to our private label customer as against our regular trade customers. So annually we go through a process which is called "cost justification" in which we compare the amount we realize from our private label business and the costs incurred thereof, against our customers, regular customers, trade customers, we call them, the realization from them as compared to the cost incurred in selling those. And we each year prove that we do not give our Safeway Bel Air product preferential treatment in price." (R. 903-904).

But no Pet witness undertook to explain anything about the sources of the underlying cost data used by Pet in preparing its cost justification, nor the basis upon which those costs were allocated. For the period prior to January 6, 1960, Pet expressly *refused* to explain even the outlines of its calculations; its letter to Safeway said that cost savings were related to five different categories of expense, but "As a matter of company policy we do not feel that we can disclose the amounts involved in each of the above factors. . . ." (Pl. Ex. 42; R. 1041, 1054, 2226, 2238).

Cost justification requires an adequate foundation in the facts which determine cost; generalized proof by broad average is not adequate. *United States v. Borden Co.*, 370 U.S. 460, 82 S.Ct. 1309. And a cost justification done in generalities on the basis of unexplained data in

order to comply with a contractual duty to "cost justify" hardly compels belief. Compare *Palmer v. Hoffman*, 318 U.S. 109, 113-114, 63 S.Ct. 477, 480.

The jury might well have concluded that the "proof" was a formality designed to reach a pre-ordained result. And it was not required, as a matter of law, to believe the man whose job it was to be sure that the proof proved what it was supposed to prove.

The Court of Appeals' conclusion that Pet's prices on Bel Air pies were ". . . fully justified by the reduced costs of manufacture, sale and delivery . . . ." (R. 1501) is another flagrant invasion of the jury's province,[10] and a keystone of its refusal to consider the effect of Pet's discriminatory pricing of the Bel Air label (Ibid.).

By its dismissal of Pet's Bel Air sales, the Court of Appeals has "whitewashed" sales amounting to 63,054 dozens of pies (126,108 cases) in Salt Lake in the 1959-1961 period—or 12.1% of all pies sold there by all sellers in that period (Pl. Ex. 62; R. 437, 2323).

---

[10]The Court of Appeals has apparently held, however, that Utah Pie should have, but failed to, "cost justify" a low *non*-discriminatory price:

> "Utah Pie also suffered a loss on its sales of frozen pies in 1958, notwithstanding it captured 66.5% of the Salt Lake City market area in that year and sold a large volume of pies, and notwithstanding its low transportation and selling costs and its other competitive advantages. *Its low price in 1958 could not, therefore, be justified by lower costs.*" (R. 1483.)

Utah Pie sold only its "Utah" brand in 1958 (Pl. Ex. 62; R. 437, 2323) and there is no suggestion in the record, and no contention made, that its pricing in that year was discriminatory.

**e. The Court of Appeals Ignored the Evidence of the Adverse Impact of Respondents' Price Discriminations on the Goodwill of the Utah Pie Co.**

Gaylen Rigby, sales manager of Utah Pie, testified to the damage to the goodwill of Utah Pie resulting from defendants' price discrimination (R. 569). He gave his opinion of the amount of damages as $75,000 (R. 570). The testimony of respondents' economic expert, Dr. Anderson, corroborated that opinion. He testified that the loss in market share of "name" brand products, as distinguished from private label, could be a competitive injury (R. 1119). The record shows that Utah Pie's loss of market share was particularly pronounced with respect to its "Utah Pie" brand (Pl. Ex. 62; R. 437, 2323).

This Court has specifically held that antitrust damages may appropriately be proved by opinion testimony where the record supports the opinion. *Story Parchment Co. v. Patterson Parchment Co.*, 282 U.S. 555, 51 S.Ct. 248. Indeed, in a case such as this, there is no other way to prove such injury, and respondents may not be heard to complain. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S.Ct. 574.

**f. The Court of Appeals Placed Undue Emphasis on Post-complaint Evidence.**

In assessing the probable effect of respondents' price discriminations upon competition, the Court of Appeals said that if they had not substantially lessened competition or tended to create a monopoly during the almost four years involved in the case "and regard be given also to Utah Pie's substantial volume increase in 1962 and the sharp volume decrease in 1962 of two of the

defendants from their 1961 volume, it would seem to be quite unlikely that such a result would probably flow from such actions in the future" (R. 1500).

Utah Pie does not question the *admissibility* of post-complaint evidence (i.e. post-September, 1961). See *FTC v. Consolidated Foods Corp.*, 380 U.S. 594, 598, 85 S.Ct. 1220, 1224. Utah Pie does, however, disagree with the inference which the Court of Appeals drew from it.

In *U.S. v. Continental Can Co.*, 378 U.S. 441, 463, 84 S.Ct. 1738, 1750, this Court said:

> "We think the District Court erred in placing heavy reliance on Continental's management in its Hazel-Atlas division after the merger *while Continental was under some pressure because of the pending government antitrust suit.*" (emphasis added).

See also *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 48, 80 S.Ct. 503, 514.

Any amelioration of respondents' practices after the complaint in this case was filed in September, 1961, was probably due to respondents' realization that they had been caught red-handed. Furthermore, the fate of the "others" in the area where respondent and Utah Pie competed might well have led the jury to conclude that competition had *already* been injured.

If what "may be" the effect of wrongful conduct *when perpetrated* is to be judged by the wrongdoer's conduct after he is sued, the private remedy for past damages will be eliminated whenever the wrongdoer ameliorates his conduct before judgment. But see *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F.Supp. 125 at

p. 143, injunction stricken on other grounds, 284 F.2d 582 (1st Cir. 1960). Cf. *Anderson v. Shipowners Association*, 31 F.2d 539 (9th Cir. 1929).

---

### 7. THE INSTRUCTIONS ON REMAND WERE ERRONEOUS AND AN ABUSE OF DISCRETION.

In its grant of certiorari the Court has asked Utah Pie to answer three questions involving the interpretation of Rule 50 of the Federal Rules of Civil Procedure. Utah Pie firmly believes that it has made a case for the jury, that it is entitled to a reversal of the judgment of the Court of Appeals on that ground, and that the Court will not find it necessary to reach these questions in this case.

If the questions are reached, the answers must turn, in part, upon the following matters shown by the record:

#### a. The Court of Appeals Did Not Consider All of Utah Pie's Evidence.

To justify its conclusion that Utah Pie's evidence was insufficient to support the verdicts, the Court of Appeals intentionally and expressly disregarded the important evidence of prices and sales in Denver. The Court of Appeals said:

> "With respect to Utah Pie's belated contention that the verdict against Continental can be supported by evidence of price discrimination violations in the Denver market area, little need be said. It is a departure from the theory on which Utah Pie, by its requested instructions, asked the court to submit its claim to the jury. It is a theory clearly not submitted

> to the jury by the court in its charge, nor passed on by the jury. The Denver market area was never mentioned and the Salt Lake City market was frequently referred to in the charge. The verdict returned was in a form submitted to the court by Utah Pie, and by its express language showed it was based solely on a price discrimination in the Salt Lake City market." (R. 1504-1505; 349 F.2d at 153).

As Utah Pie has demonstrated above, there was ample evidence to support its verdicts against all respondents, including Continental, with or without the Denver evidence. Moreover, there is no warrant in the record for the Court of Appeal's conclusion that the Denver evidence was not submitted to the jury. The record shows that Denver was very much in issue throughout the trial. The Court of Appeals' description of the charge to the jury and the form of verdict are simply wrong.

**b. Denver Was in Issue Throughout the Trial.**

Utah Pie's counsel mentioned Denver repeatedly in his argument to the jury:

> "And then what about the Denver market? Denver, obviously, is within the trading area of Salt Lake City, much closer than anything they have in California, obviously. It is a natural competitive trading area for the Utah Pie Company" (R. 1236).
>
> • • •
>
> "They left out the Denver area where they knocked everybody else out with this predatory pricing, where they had a lower price in Denver than in West Virginia" (R. 1271).
>
> • • •

"We have exactly the same situation with respect to the Denver market. You know about the Colorado market. He goes in here at one time and sells 15,000 cases. His price in Colorado is his Salt Lake price" (R. 1275).

• • •

"The Continental Baking Company, the Morton Company, had its Denver price at about 40, 50 or 60 cents below its California price and below its price in West Virginia—or in Virginia—but engaged in that discrimination.

"Its Denver price was a price so low it was said to be below cost, as the Salt Lake price was.

"You have to say to yourselves, 'If there hadn't been this price discrimination, if they had sold without discrimination, would he have had a portion of that very important and fast developing Denver market?'" (R. 1275-76).

• • •

"This is part of the Bel Air business, part of the Bell Air business—on the assumption that they would have had the Salt Lake City and Denver Divisions of the Safeway Stores. And this is allocated to the Pet Company because it was the Pet Company that had that . . . You may conclude they would have had the Salt Lake business, but not the Denver business, or you might conclude they had the Denver business as well." (R. 1276).

Continental counsel in turn adverted to Denver, and to the witness *whom he had called* to testify about Denver:

". . . we asked Mr. Doil Smith of Denver to come in here. And those people were people who were competent to tell you about the market and who competes in it . . ." (R. 1291).

• • •

"And then there have been charges against Morton in the Denver market . . . All you are given in respect to the Denver market is the plaintiff's own estimate that he lost some thousands of cases of sales in the Denver market. . . . You have a few invoices about Morton's prices in Denver. . . . You don't know a thing about Denver except plaintiff's own estimate. You just know that in 1961 he lost sales of thousands of cases in Denver." (R. 1293).

Pet counsel also mentioned Denver in his summation:

"In the Denver-Salt Lake market we are selling lower than we are here." (R. 1323).

Carnation counsel also touched upon Denver in argument:

"You are asked to believe . . . We had to agree to let Pet have this Safeway contract with all these millions of cases, and we had to let Morton have the Denver market. And you can just compare the magnitude of the market in Denver with this little Salt Lake market." (R. 1330)

• • •

"Look at the way the prices are all over the map here, the red line being Carnation. And you can take any market, any year. There's Denver, for example (indicating), and here's what it looks like." (R. 1336)

In rebuttal argument, Utah Pie's counsel again adverted to Denver:

"So don't be misled by this conversation that 'we only have a little volume, just a little volume, in this area.'

"The point is if they had expanded the whole trading area to include . . . the entire Intermountain Area

. . . then you would have seen the real volume of the Morton Company, particularly in the Denver market . . . (R. 1341-42).

* * *

"They came into Denver, Colorado at substantially lower prices in Denver than they charged that organization that was right at their door in Virginia itself." (R. 1343)

When the District Court reached his instructions on Respondents' individual Robinson-Patman § 2(a) violations, his references to the geographic area involved in the case were as follows:

"Utah area" (R. 1355, 1356, 1361, 1361 again, 1362)
"areas in which the plaintiff also sells pies." (R. 1355)
"Utah trading area." (R. 1364)

When the District Court came to his instructions *on Continental's counterclaim,* the District Court made some references to a narrower "Salt Lake City market" and "Salt Lake City area." (R. 1366). The verdicts submitted by Utah Pie on its portion of the case, however, referred to the "Utah trading area" (R. 1371) and were returned by the jury in that form (R. 1405-1406).

In short, the Court of Appeal's statement that the "Salt Lake City market was frequently referred to in the charge" (R. 1505; 349 F.2d at 153) is not a fair characterization of the record. Neither is the Court of Appeals' statement that the verdict "by its express language showed it was based solely on a price discrimination in the Salt Lake City market." (Ibid.)

On the contrary, the express language of the verdicts was that each respondent had "independently discriminated in the prices which it has charged in the *Utah trading area* . . . ." (R. 1405-1406; emphasis added). In the light of the evidence and testimony in the record, the arguments of counsel, and a fair reading of the District Court's charge, it must be concluded that the jury understood the phrase "Utah trading area" to mean the area around Utah—the area in which Utah Pie was trading—including Denver.

If in fact the jury restricted its consideration of the damage evidence to a narrower compass, it is not a matter of which respondents can complain. Instead, to the extent that the amount of the jury's verdict may have been restricted by misconception that they could only award damages for respondents' sales in Salt Lake City proper, respondents have benefited greatly. Needless to say, they did not propose instructions intended to *broaden* the geographic area submitted to the jury's consideration, and took no exception to the instructions given on the grounds that they were geographically too narrow.

Furthermore, even if the jury had been constrained to limit *damages* to those caused by respondents' Salt Lake sales, there was nothing in the instructions, and no reason in law or logic, why respondents' discriminations in other places should not have been considered as *evidence of respondents' purpose and intent*, and of the probbale consequences of their conduct.

Utah Pie respectfully submits that the Court of Appeals has erred in excluding the Denver evidence from its con-

sideration in finding Utah Pie's evidence insufficient to support the verdicts.

But assuming, arguendo, that the Court of Appeals was correct in considering only a portion of the evidence, the fact remains that the Denver evidence is in the record, and must be dealt with.

Is the Denver evidence simply to be disregarded, on the theory that Utah Pie has waived it? Surely the record indicates the exact reverse; Utah Pie relied upon and argued the Denver evidence in the belief that it was very much in the case, and was subsumed within the phrase "Utah area" or "Utah trading area." There was abundant evidence that Utah Pie's trading area included Denver (R. 531-532, 535-536, 541, 790-791, 1115-1116). The first indication which Utah Pie received that its Denver evidence was "out of the case" was when it read the opinion of the Court of Appeals so holding. It can hardly be contended that Utah Pie intentionally "waived" its Denver case.

So is the situation properly analyzed as an error in the instructions? The Court of Appeals makes the point that Utah Pie requested the instructions, apparently treating any imperfection in the instructions as error of which Utah Pie may not complain, and entitling respondents to judgment as a sort of penalty for Utah Pie's having submitted an instruction narrower than its case.

This is the state of the record which must be considered in connection with the three questions relating to Rule 50, Fed. R. Civ. P. on which this Court has asked for argument.

Utah Pie firmly believes that its case included Denver, but was sufficient to go to the jury even without the Denver evidence; that Utah Pie is entitled to a reversal on the merits, and that the Court's three questions need never be reached. Should the Court conclude, however, that it must affirm the judgment as to any respondent, Utah Pie's answers to the Court's three questions are as follows:

c. **If This Court Affirms the Judgment and Order of the Court of Appeals Directing the District Court to Enter Judgment for Respondents, May Utah Pie Then Make a Motion for a New Trial Under Rule 50(c) of the Federal Rules of Civil Procedure Within 10 Days of the District Court's Entry of Judgment for Respondents?**

Utah Pie has found no direct authority on this point. There are extremely good grounds why Utah Pie should be permitted a new trial in this case, if it is not entitled to its judgment based upon the existing verdict. But under the mandate of the Court of Appeals as it now stands, the District Court could not entertain a motion by Utah Pie for a new trial.

The question appears to be primarily a matter of interpretation of the mandate of the Court of Appeals in the light of the many options which it had in framing its instructions on remand. It is well settled that a district court may not deviate from the mandate of the Court of Appeals, and must construe it according to ordinary principles of construction. See *Johnson v. N.Y., N.H. & H. RR. Co.*, 344 U.S. 48, 49, 73 S.Ct. 125 (1952); *Atlas Scraper & Eng'r. Co. v. Pursche*, 357 F.2d 296 (9th Cir. 1966) and cases cited; *Fleniken v. Great American Indemnity Co.*, 142 F.2d 938, 939 (5th Cir. 1944).

The Mandate of the Court of Appeals must be interpreted in the light of Rule 50(d), Fed. R. Civ. P., and 28 U.S.C. § 2106 (1964). 28 U.S.C. § 2106 (1964) permits a Court of Appeals to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Courts of Appeal have used the very flexible authority given them by this statute to remand with any number of different instructions for further proceedings (or lack thereof) in the lower court.

Rule 50(d) clearly leaves the Court of Appeals with the option to:

1. Direct a new trial on remand (as was done in this case with Continental's counterclaim in this case —R. 1526); or

2. Direct the trial court to determine whether a new trial should be granted.

In addition, the Court of Appeals had available the familiar remand "for further proceedings consistent" with its opinion. Utah Pie might then have argued in the district court that "further proceedings" could reasonably be construed to include consideration of a motion for a new trial, or possibly even an order for a new trial on the Court's own initiative under Rule 59(d).

In view of these very clear alternatives, the Court of Appeals' remand with instructions "... to enter judgment for the defendants" (R. 1526) cannot reasonably be con-

strued to mean "enter judgment and then determine whether a new trial should be granted."

Indeed, if judgment is entered in the trial court in conformity with the mandate of the Court of Appeals, Utah Pie will not be a "party whose verdict has been set aside on motion for judgment notwithstanding the verdict . . ." within the language of Rule 50(c)(2). It will simply be a party against whom a final adverse judgment has been entered in conformity with the mandate of a Court of Appeals. The rule would seem to be literally inapplicable.

The answer to the Court's first question is therefore "no"; if the district court were to enter judgment on the Court of Appeals' present instructions on remand, Utah Pie would not be entitled to move at that point for a new trial.

**d. If Under the Order of the Court of Appeals, Petitioner Cannot Make a Motion for New Trial Under Rule 50(c)(2) Within 10 Days of the District Court's Entry of Judgment Against Him, Is the Order of the Court of Appeals Directing the District Court to Enter Judgment for Respondents compatible With Rule 50(b) as Interpreted by This Court in Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212; Globe Liquor Co. v. San Roman, 332 U.S. 571; and Weade v. Dichman, Wright & Pugh, 357 U.S. 301?**

This question must be examined in the light of a typical trial situation:

Plaintiff offers his evidence, some of which is admitted, and the case goes to the jury. The jury returns a plaintiff's verdict.

Plaintiff may have preserved objections to a number of potential errors committed during the trial. He may

have made some mistakes himself in his choice of arguments on admission or exclusion of evidence. He may have cast the facts in terms of one of several alternative legal theories for recovery—and the choice may have been ill advised.

But the plaintiff has his verdict, on the facts and instructions which he was able to get before the jury, and he will almost certainly resist defendant's motion for a new trial as well as defendant's motion for judgment *n.o.v.* in the trial court. He wants to keep his verdict, not lose it, or risk it at another trial. Even if error has been committed in the trial court to the disadvantage of the verdict-winning plaintiff, the plaintiff is ordinarily not interested in asserting that error so long as his verdict is intact.

But his verdict is vulnerable at several stages of the further proceedings. It is vulnerable to the motion for judgment *n.o.v.* in the trial court. It is also vulnerable upon review in the Court of Appeals of any *denial* of a motion for judgment *n.o.v.*

Of course, if the motion for judgment *n.o.v.* is granted in the trial court, the plaintiff may within ten days thereafter move for a new trial under Rule 50(c)(2), and will undoubtedly do so. Error which was not prejudicial to plaintiff's case while the verdict stood becomes prejudicial when the verdict is set aside. The Rule is so structured that the verdict-winning plaintiff may oppose both the defendant's motion for judgment *n.o.v. and defendant's motion for a new trial*, but turn around and make his own motion for a new trial if the trial court wipes out his verdict.

Assume, however, that the plaintiff has successfully defended his verdict in the trial court. The defendant's motions for judgment *n.o.v.* and for a new trial have been denied. Plaintiff has judgment on his verdict. Defendant appeals. Up to this point, the plaintiff has had no reason to ask for a new trial.

On appeal, the plaintiff's verdict is still vulnerable. But the usual grounds for appeal in the usual case are asserted errors of a type which at most entitle the defendant to a new trial (e.g., errors in instructions, or in admission or exclusion of evidence). If plaintiff should suffer reversal on one of these or similar grounds, he gets a new trial as of right, even without a motion.

But if the defendant wins a reversal in the Court of Appeals on the grounds that judgment *n.o.v.* in its favor should have been granted, plaintiff is in serious trouble. He has lost his verdict. He is in serious danger of a remand which will deprive him of a new trial, without ever having had an opportunity to present a motion for a new trial to the trial court. When the Court of Appeals concludes that judgment *n.o.v.* should have been granted in the trial court, its mandate may well be (as here) for "entry of judgment for defendant." The possibility of a remand with those instructions is generally recognized. See, *e.g.*, *New York, N.H. & H. R.R. Co. v. Henagan*, 364 U.S. 441, 81 S.Ct. 198 (1960); *Quinby v Morrow*, 340 F.2d 584, (2d Cir. 1965); *Lloyd's of London v. Cordova Airlines, Inc.*, 283 F.2d 659, 665 (9th Cir. 1960); *Yorkshire Indemnity Co. v. Roosth & Genecov Prod. Co.*, 252 F.2d 650, 657 (5th Cir. 1958); *Garman v. Metropolitan Life Ins. Co.*, 175 F.2d 24, 28 (3d Cir. 1949).

Such a result can be highly unjust. Much depends upon the grounds relied upon by the Court of Appeals in concluding that the plaintiff's case had a fatal "hole" in it.

One situation would be the case in which plaintiff's case was pleaded and proved in full, but simply insufficient in law. Examples might include private actions under statutes which do not create a private action (see, *e.g., Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 78 S.Ct. 352 (1958)), or other instances in which the plaintiff has proved what he has pleaded, but in which his pleadings failed to state a claim upon which relief could be granted.

Another situation would be the case in which the plaintiff has pleaded a good case, offered evidence to prove it, but has been unable to get particular testimony or exhibits admitted into evidence. The trial court has found plaintiff's case sufficient without the missing evidence. The Court of Appeals finds a fatal hole in the plaintiff's case which the excluded evidence would have filled.

Still another situation is that presented in *Weade v. Dichman, Wright & Pugh*, 337 U.S. 801, 69 S.Ct. 1326 (1949). There, the plaintiff's case was held sufficient by the trial court, and plaintiff had judgment on her verdict. On appeal, the Court of Appeals held (correctly) that plaintiff's theory of liability (expressed in the instructions of which plaintiff could not complain) was legally untenable. Plaintiff's chosen theory of the case simply did not state a claim upon which relief could be granted. The Court of Appeals reversed with instructions to enter judgment for the defendant. This Court disagreed, stating:

"By the decision below, the trial court was directed to enter a judgment for respondent, which had filed a motion for judgment notwithstanding the verdict. As there were suggestions in the complaint and evidence of alleged liability . . . [on another theory] this direction should not have been given." (337 U.S. at 808)

In other words, plaintiff's *theory* of the case was untenable, but her *evidence* was quite possibly adequate on a somewhat different theory.

The situation is analogous to that presented in *Byrd v. Blue Ridge Rural Elec. Co-op, Inc.*, 356 U.S. 525, 78 S. Ct. 893 (1958). There, the plaintiff moved to strike an affirmative defense, and the motion was granted in the trial court. The Court of Appeals found, on the evidence in the record, that the defense was available, that it was proven, and that it was dispositive of the case. The Court of Appeals ordered judgment for the defendant. This Court reversed and remanded, saying:

"At all events, the petitioner is plainly entitled to have an opportunity to try the issue under the Court of Appeals' interpretation." (356 U.S. at 532)

In other words, the plaintiff was not to be subjected to summary disposition of his case where *his own motion* created the error which caused him not to introduce evidence which he might otherwise have introduced:

"The petitioner was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceedings, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of

his day in court to try the issue under the correct interpretation of the statute. Cf. *Fountain v. Filson*, 336 U.S. 681; *Weade v. Dichman, Wright & Pugh, Inc.*, 337 U.S. 801; *Globe Liquor Co. v. San Roman*, 332 U.S. 571; *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212." (356 U.S. at 533)

The parallel to this case is obvious: here the Court of Appeals finds that the instructions did not submit a portion of the evidence to the jury, that that evidence may therefore not be considered in testing the sufficiency of the evidence, and that Utah Pie may not complain of the instructions, since it proposed them (R. 1504-1505).

By in effect "removing" some of plaintiff's evidence (on the ground that the instructions took it from the jury) the Court of Appeals has *created* the "hole" which it finds in plaintiff's case—a hole not visible to Utah Pie, the trial court or the jury. Utah Pie vigorously urges that the instructions tendered (and the jury considered) the Denver evidence in the case at bar. But assuming arguendo that the Court of Appeals was correct in finding a "hole" in Utah Pie's case, it was a hole which first became visible when the Court of Appeals announced its decision in the case.

If the trial court had found the asserted "hole" in Utah Pie's case in the course of respondents' post-verdict motions, Utah Pie would have had 10 days in which to move for a new trial. In the interest of justice, that motion should have been granted. See *Weade v. Dichman, Wright & Pugh*, 337 U.S. 801, *supra*.

In contrast to the practice in the District Courts, there is no provision for a motion in the Court of Appeals for

a new trial within ten days after a decision holding that judgment *n.o.v.* should have been granted. The party whose judgment withstood the motion for judgment *n.o.v.* in the trial court "may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict." (Rule 50(d), Fed. R. Civ. P.)

But only in the case where the "hole" in the appellee's case was put there in the trial court is the appellee likely to be able to derive any advantage from that provision of the Rule.

If, for example, the trial court has excluded evidence, the prevailing party may argue on appeal that the exclusion was error and that if there is a "hole" in his case, the improperly excluded evidence would fill that hole.

But where the appellee has introduced its available evidence, it will ordinarily stand or fall on the sufficiency of the case thus made. It can hardly be expected to anticipate that the Court of Appeals will punch a hole in its case by intentionally ignoring substantial portions of the evidence.[11]

Here, Utah Pie does not claim that any evidence which should have been admitted has been erroneously excluded from the evidence in the trial court. It did not, and could hardly have been expected to, anticipate that the Court of

---

[11]Indeed the "burden of foresight" which such a rule would place upon the verdict-winner is crushing. See discussion of this and related matters under Rule 50, in Kaplan, Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II), 77 Harv. L. Rev. 801, 818-820 (1964).

Appeals would "exclude" evidence which it had offered, argued, and (as it believed) submitted to the jury.

Utah Pie most respectfully urges that if the judgment of the Court of Appeals setting aside the judgment for plaintiff is correct, its mandate denying Utah Pie a new trial (or at least the opportunity to make a motion for a new trial) was error, and must be reversed.

**e. Does Rule 50(d) of the Federal Rules of Civil Procedure Provide the Court of Appeals With Any Authority to Direct the Entry of Judgment for Respondents?**

Rule 50(d) does not give the Court of Appeals the authority to direct entry of judgment for respondents and thereby deny to Utah Pie a new trial, or at least the opportunity to make a motion for a new trial in the trial court, in the facts of this case.

To be sure, Rule 50(d) apparently *assumes* that the Court of Appeals has the power to remand a case for entry of ultimate, final, judgment for a defendant. Such a remand is proper in some cases (i.e. where it is perfectly clear that a plaintiff could not possibly make a case on any legal theory with the facts presented by the record). In such a case the "hole" in the plaintiff's case is irreparable.

Rule 50(d) also gives an appellee who has obtained a verdict and judgment *in spite of errors committed against him* to suggest those errors in the Court of Appeals as grounds for a new trial. In such a case, if the Court of Appeals finds a "hole" in the plaintiff's case the plaintiff knows that he has some "patches" in the form of evidence erroneously excluded, or the like.

But where, as here, the Court of Appeals has created a hole by "excluding" evidence, the plaintiff-appellee has no way of knowing that the hole is in its case until it sees the Court of Appeals' opinion. At that point, the Court of Appeals has the "patch" in hand—the evidence which it "excluded" to create the hole in the first place.

In short, Rule 50(d) is permissive. The Notes of the Advisory Committee on Rules specifically state that it does not ". . . attempt regulation of all aspects of the procedure where the motion for judgment *n.o.v.* and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in the formative stage." (28 U.S.C.A. Rule 50 pocket part (1965) p. 185; 83 S.Ct. (front) 72)

Clearly beyond the "formative stage" however are the principles which ought to apply in the developing practice under Rule 50(d). Foremost among those principles is the principle that cases should, whenever possible, be decided on their merits. Justice requires no less.

This principle finds expression throughout the Federal Rules of Civil Procedure. It finds expression in the liberal rule of pleading and amendments to pleadings. It is facilitated by the flexible rules on joinder of parties, interpleader and intervention. It is expressed in the liberal rules for the discovery of evidence; and for the introduction and admission of that evidence at trial.

The principle that cases should be decided upon the facts and by the trier of facts finds expression in the many decisions of this court reversing summary judg-

ments and judgments on the pleadings or other invasions of the jury's fact-finding province. See, *e.g.*, *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486 (1962); *White Motor Co. v. United States*, 372 U.S. 253, 83 S.Ct. 696 (1963); *Atlantic & Gulf Stevedores, Inc. v. Ellerman*, 369 U.S. 355, 360, 82 S.Ct. 780, 784 (1962).

It also finds expression in the decision of this court in *Weade v. Dichman, Wright & Pugh*, 337 U.S. 801, 69 S.Ct. 1326 (1949) in which this court clearly held that the defendant was *not* liable to plaintiff on the theory under which the case had been submitted to the jury, but nevertheless held it improper for a Court of Appeals to order judgment for the defendant when there was a suggestion in the record of a possible alternative ground of recovery which the plaintiff had not yet presented to the jury. See also *Byrd v. Blue Ridge Rural Elec. Co-op, Inc.*, 356 U.S. 525, 78 S.Ct. 893.

The same principle that cases should be decided on their merits is embodied in Rule 60(b) allowing final judgments to be set aside in certain circumstances, including mistake, inadvertence, surprise or excusable neglect, and newly discovered evidence which could not have been discovered in time to move for a new trial under Rule 59(b). In its reference to Rule 59(b), Rule 60(b) assumes that a showing of additional evidence which might be offered is grounds for a new trial.

The other principle which finds expression throughout the pronouncements of this Court governing the allocation of discretionary authority over trial proceedings is that such matters should, wherever possible, be entrusted to the discretion of the trial court:

> "His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." (*Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. at 216.)

Rule 50(d) does give the Court of Appeals authority to order a new trial in a case of this sort, even if it has found, in the way the Court of Appeals here found, that all of the evidence was not submitted to the jury and that as a result the evidence was insufficient. Rule 50(d) also gives the Court of Appeals authority to order the district court to decide whether a new trial should be granted.

Under its decision in this case, the Court of Appeals should have ordered a new trial.

Under *Cone, supra,* the Court of Appeals should, at a very minimum, have specifically directed the trial court to consider whether a new trial should be had. The decision of the Court of Appeals to order judgment for respondents without any chance of a new trial was error, and the judgment should be reversed on that ground even if the Court of Appeals was correct in deciding that Utah Pie's evidence (as submitted to the jury) was insufficient.

### 8. UTAH PIE SHOULD HAVE JUDGMENT FOR COSTS, INCLUDING A REASONABLE ATTORNEY'S FEE.

Costs follow the outcome of the case in this Court without regard to its ultimate outcome, unless otherwise ordered. Sup. Ct. Rule 57. Several Circuits have held that an award of attorney's fees, in addition to taxable costs, is properly awarded to an antitrust plaintiff who has prevailed on an appeal, under Section 4 of the Clayton Act, 15 U.S.C. §15: *Samuel Goldwyn v. Twentieth Century Fox*, 328 F.2d 190, 226 (9th Cir. 1964); *North Texas Producers Association v. Young*, 308 F.2d 235, 246 (5th Cir. 1962); *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763, 772 (7th Cir. 1930).

Inasmuch as costs awarded at trial compensate only for costs and attorney's efforts theretofore expended, the rule is a salutory one, and Utah Pie urges that this Court adopt it.

---

## CONCLUSION

Utah Pie's evidence was more than sufficient to permit a jury to find that each of the respondents discriminated in the prices which it charged for frozen pies, and that the reasonably likely consequence in each instance was a substantial lessening of competition or a tendency to create a monopoly. On this record, the jury was not compelled to find that any of the respondents had sustained any of its affirmative defenses. Therefore, these cases should each be reversed and remanded to the Court of Appeals with instructions to rule upon respondents' other assignments of error, and to affirm Utah Pie's judgments if no prejudicial error be found.

But in the event that this Court concludes that part of Utah Pie's evidence was removed from the jury's consideration by the instructions, and that Utah Pie's remaining evidence was for that reason insufficient to sustain the verdicts, the judgment of the Court of Appeals should nevertheless be reversed with instructions to order a new trial, or at least to permit the trial court to rule on a motion for a new trial.

Finally, Utah Pie prays that it have its costs in this Court, including a reasonable attorney's fee.

Respectfully submitted,

JOSEPH L. ALIOTO,
*Attorney for Petitioner.*

MATTHEW P. MITCHELL
ROBERT W. HUGHES
*Of Counsel.*

(Appendices Follow)

## Appendix A

Section 2 of the Clayton Act, 38 Stat. 730, § 2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, §1 (1936), 15 U.S.C. § 13 (1964).

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of mo-

nopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet in equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or

grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

---

Section 3 of the Clayton Act, 38 Stat. 731, § 3 (1914), 15 U.S.C. § 14 (1964).

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

---

Section 4 of the Clayton Act, 38 Stat. 731, § 4 (1914), 15 U.S.C. § 15 (1964).

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without

respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

---

Section 7 of the Clayton Act, 38 Stat. 731, § 7 (1914) (amended by 64 Stat. 1125 (1950)), as amended, 15 U.S.C. § 18 (1964).

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in

this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

---

Section 16 of the Clayton Act, 38 Stat. 737, § 13 (1914), 15 U.S.C. § 26 (1964).

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

U.S. Const. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

---

Fed. R. Civ. P. 50, 308 U.S. 63 (1938)

Rule 50. Motion for a Directed Verdict

(a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.

A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

---

Fed. R. Civ. P. 50, as amended January 21, 1963, effective July 1, 1963, 374 U.S. 885, 83 S.Ct. 27

Rule 50. Motion for a Directed Verdict

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed ver-

dict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; of if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion. (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

## Appendix B

### COMPARATIVE PET PRICES

**24 Ounce Pies**
**(Cases of 6)**

**APPLE**

| Month | High Price Area—California (Pet-Ritz Prices per Pl. Exs. 116, 118, 119, 122; R. 993, 996; 4836, 5034, 5098, 5318, as shown) | | Salt Lake (D. Ex. A-35; R. 1065, 5827; 5837-5838, 5844) | |
|---|---|---|---|---|
| | Area | Price | Pet-Ritz (Low Price) | Bel-Air (Price) |
| July '59 | (San Rafael, R. 5318, 5319) | $2.14 | $2.06 | $1.85 |
| Sept. '59 | (Sacramento, R. 5320; Fresno, R. 5321) | 2.14 | 2.02 | 1.89 |
| Oct. '59 | (Sacramento, R. 5322) | 2.14 | 2.02 | 1.89 |
| Nov. '59 | (Sacramento, R. 5326; Los Angeles, R. 5324; Oakland, R. 5329; Hayward, R. 5325, 5327; Modesto, R. 5328) | 2.14 | 2.02 | 1.89 |
| Dec. '59 | (Modesto, R. 5331) | 2.14 | 1.92 | 1.89 |
| Jan. '60 | (Modesto, R. 5117, 5121, 5122; Sacramento, R. 5106, 5107, 5120, 5128; Oakland, R. 5115; Bakersfield, R. 5130; Hayward, R. 5113, 5114; Lodi, R. 5102) | 2.14 | 2.06 | 1.79 |

| California | Price | Pet-Ritz (Low Price) | Bel-Air (Price) |
|---|---|---|---|
| | | (Salt Lake) | |
| Feb. '60 (Modesto, R. 5136, 5144, 5146, 5151; Sacramento, R. 5126, 5137, 5147, 5150; Oakland, R. 5139, 5149, 5153; Fresno, R. 5123; San Jose, R. 5127; Lodi, R. 5138, 5145; San Rafael, R. 5152) | 2.14 | 1.90 | 1.83 |
| March '60 (Modesto, R. 5158, 5163, 5165, 5169, 5174, 5178; Sacramento, R. 5157, 5164; Oakland, R. 5161, 5168, 5179; Bakersfield, R. 5156; San Diego, R. 5177; Northridge, R. 5159, 5166, 5171) | 2.14 | 1.89 | — |
| April '60 (Modesto, R. 5186, 5189, 5191, 5199, 5202; Oakland, R. 5185, 5193, 5195, 5200, 5204; San Rafael, R. 5194, 5201; Los Angeles, R. 5203; Northridge, R. 5196) | 2.14 | 2.32 | 1.83 |
| May '60 (Modesto R. 5205, 5206, 5210, 5212; Oakland, R. 5207, 5209, 5213, 5214) | 2.14 | 2.06 | 1.83 |
| June '60 (Modesto, R. 5220, 5221; Oakland, R. 5216, 5218, 5219, 5222; Hayward, R. 5217) | 2.14 | 1.96 | 1.83 |

| California | Price | Pet-Ritz (Low Price) (Salt Lake) | Bel-Air (Price) |
|---|---|---|---|
| July '60 (Modesto, R. 4838, 4839, 4840; Sacramento, R. 4842, 4853; Oakland, R. 4845; Bakersfield, R. 4843, 4847, 4852) | 2.32 | 1.96 | 1.83 |
| Aug. '60 (Modesto, R. 4849, 4850, 4855; Sacramento, R. 4851, 4856, 4860; Bakersfield, R. 4857, 4858; Oakland, R. 4859, 4863; San Rafael, R. 4861) | 2.32 | 2.06 | —— |
| Oct. '60 (Modesto, R. 4865, 4867, 4868, 4875, 4879, 4880; Sacramento, R. 4872, 4874, 4877, 4878; Bakersfield, R. 4866, 4869, 4873, 4876; Oakland, R. 4870) | 2.32 | 2.20 | 1.83 |
| Nov. '60 (Modesto, R. 4881, 4882, 4886, 4887, 4891, 4894; Sacramento, R. 4883, 4884, 4889, 4898, 4900, 4901, 4903; Oakland, R. 4896, 4902; Bakersfield, R. 4888, 4892, 4895, 4897; Lodi, R. 4893) | 2.32 | 2.24 | 1.83 |
| Dec. '60 (Modesto, R. 4904; Sacramento, R. 4905, 4907, 4909, 4911, 4912, 4914, 4916, 4918, 4920, 4921, 4923) | 2.32 | 2.24 | 1.83 |
| Feb. '61 (Northridge, R. 5034) | 2.20 | 2.02 | 1.78 |

| California | Price | Pet-Ritz (Low Price) (Salt Lake) | Bel-Air (Price) |
|---|---|---|---|
| March '61 (Northridge, R. 5035, 5036, 5037, 5038, 5039, 5040) | 2.20 | 2.04 | 1.73 |
| April '61 (Northridge, R. 5041, 5042) | 2.20 | 2.00 | 1.73 |
| May '61 (Northridge, R. 5043) | 2.20 | 2.24 | 1.73 |

## COMPARATIVE PET PRICES

24 Ounce Pies
(Cases of 6)

CHERRY

| Month | High Price Area—California (Pet-Ritz Prices per Pl. Exs. 116, 118, 119, 122; R. 993, 996; 4836, 5034, 5098, 5318, as shown) | | Salt Lake (D. Ex. A-35; R. 1065, 5827; 5837-5838, 5844) | |
|---|---|---|---|---|
| | Area | Price | Pet-Ritz (Low Price) | Bel-Air (Price) |
| July '59 | (San Rafael, R. 5318) | $2.30 | $2.06 | $1.86 |
| Sept. '59 | (Sacramento, R. 5320) | 2.14 | 2.02 | 1.89 |
| Oct. '59 | (Sacramento, R. 5322) | 2.14 | 2.02 | 1.89 |
| Nov. '59 | (Sacramento, R. 5326; Oakland, R. 5329; Los Angeles, R. 5324; Hayward, R. 5325) | 2.14 | 2.02 | 1.89 |
| Dec. '59 | (Modesto, R. 5331) | 2.14 | 1.92 | 1.89 |
| Jan. '60 | (Modesto, R. 5102, 5117, 5122; Sacramento, R. 5106, 5107, 5120, 5128; Oakland, R. 5115; Bakersfield, R. 5130; San Rafael, R. 5125; Hayward, R. 5113, 5114) | 2.14 | 2.06 | 1.79 |
| Feb. '60 | (Modesto, R. 5133, 5136 5144, 5146; Sacramento, R. 5126, 5137, 5147, 5150; Oakland, R. 5139, 5149, 5153; Lodi, R. 5145; Fresno, R. 5123; San Jose, R. 5127) | 2.14 | 1.90 | 1.90 |

| California | Price | Pet-Ritz (Low Price) (Salt Lake) | Bel-Air (Price) |
|---|---|---|---|
| March '60 (Modesto, R. 5163, 5165, 5169, 5174, 5178; Sacramento, R. 5164; Oakland, R. 5161, 5168, 5179; Bakersfield, R. 5156; Northridge, R. 5159, 5166) | 2.14 | 1.89 | 1.90 |
| April '60 (Modesto, R. 5189, 5191, 5199, 5202; Oakland, R. 5185, 5193, 5195, 5200, 5204; San Rafael, R. 5194, 5201; Northridge, R. 5196) | 2.14 | 2.02 | 1.90 |
| May '60 (Modesto, R. 5206, 5210, 5212; Oakland, R. 5207, 5209, 5213, 5214) | 2.14 | 2.06 | 1.90 |
| June '60 (Modesto, R. 5215, 5220, 5221; Oakland, R. 5216, 5218, 5219, 5222; Hayward, R. 5217) | 2.14 | 2.06 | 1.90 |
| July '60 (Modesto, R. 4838, 4839, 4840; Sacramento, R. 4848, 4853; Oakland, R. 4845; Bakersfield, R. 4843, 4847, 4852) | 2.32 | 2.02 | 1.90 |
| Aug. '60 (Modesto, R. 4850, 4855; Sacramento, R. 4860; Oakland, R. 4859, 4863; Bakersfield, R. 4857, 4858) | 2.32 | 2.02 | — |

| California | Price | Pet-Ritz (Low Price) (Salt Lake) | Bel-Air (Price) |
|---|---|---|---|
| Oct. '60 (Modesto, R. 4865, 4867, 4868, 4871, 4875, 4880; Sacramento, R. 4874, 4877, 4878; Bakersfield, R. 4866, 4869, 4873, 4876) | 2.32 | 2.20 | 1.90 |
| Nov. '60 (Sacramento, R. 4884, 4898, 4900, 4903; Oakland, R. 4896, 4902; Bakersfield, R. 4892, 4895, 4897) | 2.32 | 2.24 | —— |
| Dec. '60 (Modesto, R. 4904, 4913; Sacramento, R. 4907, 4911, 4912, 4914, 4916, 4918, 4920, 4921, 4923; Bakersfield, R. 4910) | 2.32 | 2.32 | 1.90 |
| Feb. '61 (Northridge, R. 5034) | 2.20 | 2.02 | 1.90 |
| March '61 (Northridge, R. 5035, 5036, 5037, 5040) | 2.20 | 2.05 | 1.90 |
| April '61 (Northridge, R. 5041, 5042) | 2.20 | 2.00 | 1.90 |
| May '61 (Northridge, R. 5043) | 2.20 | 2.20 | 1.90 |

## Appendix C

### CONTINENTAL'S PRICE DISCRIMINATIONS
8" pie, per dozen

I

APPLE*

| Date | High Price Areas (Sales at or above prices shown) | | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|---|
| | Area | Price | Denver | | Salt Lake |
| | | 1959 | | | |
| April 1-10 | | | | | |
| | Wash. (R. 3808, 3809) | $4.60 | $3.65 | (R. 2913, 2914, 2915, 2916, 2918, 2921, 2923, 2924, 2925) | $4.60 (R. 4653) |
| April 11-20 | | | | | |
| | Wash. (R. 3812) | 4.02 | 3.65 | (R. 2917, 2927, 2928, 2929, 2804) | 4.82 (R. 4651) |
| | Wash. (R. 3814, 3827) | 4.28 | | | |
| | Wash. (R. 3819) | 4.36 | | | |
| | Wash. (R. 3821, 3822) | 4.60 | | | |
| April 21-30 | | | | | |
| | Wash. (R. 3828, 3853) | 4.34 | 3.65 | (R. 2806, 2930, 2932, 2933, 2934, 2935, 2939) | |
| | Wash. (R. 3820, 3823, 3824) | 4.60 | | | |
| May 1-10 | | | | | |
| | Wash. (R. 3826, 3829, 3831, 3833) | 4.60 | 3.65 | (R. 2931) | |

*Source: invoices contained in Pl. Ex. 10; R. 90, 2052; Pl. Ex. 11; R. 90, 2054; Pl. Ex. 12; R. 90, 2055; Pl. Ex. 13; R. 90, 2056; Pl. Ex. 14; R. 114, 2057; Pl. Ex. 35; R. 380, 2205; Pl. Ex. 78, R. 536-537, 2773; Pl. Ex. 79; R. 536-537, 2987; Pl. Ex. 80; R. 536-537, 3355; Pl. Ex. 83; 533, 534, 3617; Pl. Ex. 84; 538, 3796; Pl. Ex. 85; 538, 3796; Pl. Ex. 86; 538, 3984; Pl. Ex. 87; 538, 4188; Pl. Ex. 88; 542, 4373; Pl. Ex. 89; 542, 4405, and for some Salt Lake sales, D. Ex. A-35; R. 1065, 5827, 5842, as indicated.

| Date | High Price Areas (Sales at or above prices shown) Area | Price | Low Price Areas (Sales at prices shown) Denver | Salt Lake |
|---|---|---|---|---|
| | | 1959 (con't) | | |
| May 11-20 | | | | |
| | Wash. (R. 3832, 3837) | 4.34 | 3.65 (R. 2940) | |
| May 21-31 | | | | |
| | Wash. (R. 3836) | 4.32 | | |
| | Wash. (R. 3838, 3839) | 4.60 | 3.93 (R. 2815, 2816) | 4.60 (R. 4652) |
| June 1-10 | | | | |
| | Wash. (R. 3840, 3841, 3846, 3849, 3850) | 4.32 | 3.65 (R. 2943) | |
| | Oregon (R. 4387, 4388, 4390) | 4.60 | | |
| June 11-20 | | | | |
| | Wash. (R. 3850, 3851, 3852, 3854, 3855, 3856) | 4.32 | 3.65 (R. 2945, 2947) | |
| | Oregon (R. 4387) | 4.60 | | |
| June 21-30 | | | 3.93 (R. 2834, 2835, 2836) | |
| July 1-10 | | | 3.65 (R. 2951) | |
| July 11-20 | | | | |
| | Wash. (R. 3867) | 4.28 | 3.67 (R. 2953, 2954) | |
| July 21-31 | | | 3.77 (R. 2957) | |
| Aug. 1-10 | | | | |
| Aug. 11-20 | | | | |
| | Wash. (R. 3874) | 4.28 | | |
| Aug. 21-31 | | | | |
| | Wash. (3870, 3876) | 4.28 | | |
| Sept. 1-10 | | | | |
| | Wash. (R. 3877) | 4.28 | 3.93 (R. 2853) | |
| | Oregon (R. 4396, 4397, 4398, 4399) | 4.28 | | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| | Area | Price | Denver | Salt Lake |
| | | 1959 (con't) | | |
| Sept. 11-20 | | | | |
| | Wash. (R. 3884) | 4.00 | 3.93 (R. 2854, 2857) | |
| | Wash. (R. 3886, 3888) | 4.12 | | |
| Sept. 21-30 | | | | |
| | Wash. (R. 3889, 3891, 3892) | 4.28 | 3.65 (R. 2858) | |
| Oct. 1-10 | | | | |
| | Wash. (R. 3893) | 4.04 | 3.65 (R. 2965, 2967) | |
| | Wash. (R. 3890, 3895, 3896, 3897, 3898, 3902) | 4.28 | | |
| Oct. 11-20 | | | | |
| | Wash. (R. 3894) | 4.04 | 3.69 (R. 2968) | |
| | Wash. (R. 3899, 3900, 3901) | 4.28 | | |
| Oct. 21-31 | | | | |
| Nov. 1-10 | | | | |
| | Wash. (R. 3907, 3910) | 4.00 | 3.93 (R. 2873) | |
| | Wash. (R. 3904) | 4.28 | | |
| Nov. 11-20 | | | | |
| | Wash. (R. 3911, 3912, 3923, 3925) | 4.04 | 3.65 (R. 2971) | |
| | Oregon (R. 4396) | 4.28 | | |
| | Wash. (R. 3916, 3920) | 4.28 | | |
| Nov. 21-30 | | | | |
| | Wash. (R. 3957, 3981) | 4.28 | 3.65 (R. 2974, 2975, 2976, 2977, 2810, 2974, 2975, 2976) | |
| Dec. 1-10 | | | | |
| | Wash. (R. 3962) | 4.28 | 3.65 (R. 2981, 2980, 2979, 2978) | |
| Dec. 11-20 | | | | |
| | Wash. (R. 4184) | 4.00 | 3.93 (R. 2884) | |
| | Wash. (R. 3979, 3987) | 4.12 | | |
| | Wash. (R. 3968, 3972) | 4.28 | | |
| Dec. 21-31 | | | 3.65 (R. 2984) | |

| Date | High Price Areas (Sales at or above prices shown) Area | Price | Low Price Areas (Sales at prices shown) Denver | Salt Lake |
|---|---|---|---|---|
| | | 1960 | | |
| Jan. 1-10 | | | | |
| | Wash. (R. 4144) | 4.28 | | |
| | Wash. (R. 4145) | 4.12 | | |
| Jan. 11-20 | | | | |
| | Wash. (R. 4150, 4151) | 4.12 | 3.80 (R. 3272, 3273, 3275, 4408) | |
| | Wash. (R. 4146, 4147, 4148, 4149) | 4.28 | | |
| Jan. 21-31 | | | | |
| | Wash. (R. 4153, 4156) | 4.04 | 3.35 (R. 3163) | |
| | Wash. (R. 4155, 4167) | 4.28 | | |
| | Virginia (R. 534) | 3.80 | | |
| Feb. 1-10 | | | | |
| | Wash. (R. 4162, 4173) | 4.00 | 3.35 (R. 3309, 3310, 3312, 3313) | |
| | Wash. (R. 4140, 4154, 4157, 4158, 4159, 4160, 4163, 4164) | 4.28 | | |
| Feb. 11-20 | | | | |
| | Wash. (R. 3997) | 4.00 | 3.35 (R. 4410) | |
| | Wash. (R. 3994, 4165) | 4.28 | | |
| Feb. 21-29 | | | | |
| | Wash. (R. 3990, 4132) | 4.00 | 3.35 (R. 3314) | |
| | Wash. (R. 3996, 3998) | 4.28 | | |
| March 1-10 | | | | |
| | Wash. (R. 4000, 4002, 4003) | 4.28 | 3.50 (R. 3024) | |
| | Wash. (R. 4177) | 4.04 | | |
| March 11-20 | | | | |
| | Wash. (R. 4007) | 4.28 | 3.50 (R. 3025) | |
| March 21-31 | | | | |
| | Wash. (R. 4011) | 3.80 | 3.35 (R. 3009, 3031, 3147, 3329) | |
| | Wash. (R. 4006, 4008) | 4.28 | | |
| April 1-10 | | | | |
| | Wash. (R. 4016 | 3.80 | 3.80 (R. 3035) | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| | Area | Price | Denver | Salt Lake |
| | | 1960 (cwt.) | | |
| April 11-20 | | | | |
| | Wash. (R. 4020, 4021) | 3.80 | 3.65 (R. 3308) | |
| | Wash. (R. 4013) | 3.66 | | |
| April 21-30 | | | | |
| | Wash. (R. 4027, 4168, 4170, 4171, 4175, 4180) | 3.64 | 3.35 (R. 3148) | |
| | Wash. (R. 4015) | 3.80 | | |
| May 1-10 | | | | |
| | Wash. (R. 4029, 4133, 4172, 4178) | 3.64 | | |
| May 11-20 | | | | |
| | Wash. (R. 4031, 4179) | 3.64 | 3.35 (R. 3150, 3328) | |
| May 21-31 | | | | |
| | Wash. (R. 4023, 4036, 4039, 4042, 4062) | 3.80 | 3.35 (R. 3325, 3326, 3327) | |
| June 1-10 | | | | |
| | Wash. (R. 4041) | 3.80 | 3.35 (R. 3323, 3331) | |
| | Wash. (R. 4119) | 3.64 | | |
| June 10-20 | | | | |
| | Wash. (R. 4066) | 3.64 | 3.35 (R. 3330) | |
| | Wash. (R. 4055, 4057, 4060, 4063, 4065) | 3.80 | | |
| June 21-30 | | | | |
| | Wash. (R. 4051) | 3.64 | 3.65 (R. 3175) | |
| | Wash. (R. 4040) | 3.70 | | |
| | Wash. (R. 4054) | 3.80 | | |
| July 1-10 | | | | |
| | Wash. (R. 4035) | 4.16 | 3.20 (R. 3176, 3177, 3179, 3182, 3186) | |
| | | | 2.91 (R. 3180) | |
| July 11-20 | | | | |
| | Wash. (R. 4103) | 3.64 | 3.20 (R. 3183, 3184, 3187, | |
| | Wash. (R. 4049) | 4.16 | 3188, 3200) | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| Area | Price | Denver | | Salt Lake |
| **1960 (con't)** | | | | |
| July 21-31 | | | | |
| Wash. (R. 4045) | 4.16 | 3.20 (R. 3185, 3189, 3141) | | |
| Aug. 1-10 | | 3.20 (R. 3201, 3216) | | |
| Aug. 11-20 | | 3.65 (R. 3199) | | |
| Aug. 21-31 | | 3.20 (R. 3216) | | |
| Sept. 1-10 | | 3.20 (R. 3213, 3214, 3215) | | |
| Sept. 11-20 | | | | |
| Wash. (R. 4072) | 4.16 | 3.65 (R. 3173) | | |
| Sept. 21-30 | | 3.20 (R. 3172) | | |
| Oct. 1-10 | | | | |
| Wash. (R. 4080, 4081) | 4.16 | | | |
| Oct. 11-20 | | 3.29 (R. 3232) | | |
| Oct. 21-31 | | 3.20 (R. 3170, 3171) | | |
| Nov. 1-10 | | 3.20 (R. 3001) | | |
| Nov. 11-20 | | | | |
| Wash. (R. 4088) | 3.50 | 3.20 (R. 3249) | | 3.20 (R. 5842) |
| Nov. 21-30 | | | | |
| Wash. (R. 4090, 4117, 4118, 4120, 4127) | 3.34 | 3.20 (R. 3251) | | |
| Wash. (R. 4087) | 3.50 | | | |
| Dec. 1-10 | | | | |
| Wash. (4121, 4129) | 3.34 | 3.20 (R. 3258, 3260, 3261, 3263) | | |
| Wash. (R. 4130) | 3.50 | | | |
| Dec. 11-20 | | | | |
| Wash. (R. 4134) | 3.34 | | | |
| Dec. 21-31 | | | | |
| Wash. (R. 4131) | 3.34 | 3.20 (R. 3168, 3262) | | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| | Area | Price | Denver | Salt Lake |
| | | 1961 | | |
| Jan. 1-10 | | | | |
| Jan. 11-20 | | | | |
| | Wash. (R. 4372) | 3.34 | 3.35 (R. 3419) | |
| | Wash. (R. 4266) | 3.50 | | |
| Jan. 21-31 | | | | |
| | Wash. (R. 4317) | 3.34 | 3.30 (R. 3418) | |
| | Wash. (R. 4265, 4269) | 3.50 | | |
| Feb. 1-10 | | | | |
| | Wash. (R. 4318, 4319) | 3.34 | 3.00 (R. 3469, 3479, 3480, | |
| | Wash. (R. 4268) | 3.50 | 3481, 3482, 3496) | |
| Feb. 11-20 | | | | |
| | Wash. (R. 4271, 4320) | 3.34 | 3.00 (R. 3478) | 3.38 (R. 5842) |
| Feb. 21-29 | | | | |
| | Wash. (R. 4321) | 3.34 | | |
| March 1-10 | | | | |
| | Wash. (R. 4270, 4324) | 3.34 | 3.00 (R. 3491, 3492, 3493) | |
| | | | 3.03 (R. 3611) | |
| March 11-20 | | | | |
| | Wash. (R. 4272) | 3.38 | 3.00 (R. 3490) | |
| | Wash. (R. 4273) | 3.50 | | |
| March 21-31 | | | | |
| | Wash. (R. 4325, 4326, 4327) | 3.34 | 3.00 (R. 3471) | |
| | Wash. (R. 4274) | 3.50 | | |
| April 1-10 | | | | |
| | Wash. (R. 4276) | 3.50 | | |
| April 11-20 | | | | |
| | Wash. (R. 4280) | 3.34 | 3.05 (R. 3474, 3476, | 3.40 (R. 5842) |
| | Wash. (R. 4278) | 3.50 | 3477) | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | | |
|---|---|---|---|---|---|
| | Area | Price | Denver | | Salt Lake |
| | | 1961 (con't) | | | |
| April 21-30 | | | | | |
| | Wash. (R. 4281, 4328, 4329) | 3.34 | 3.00 (R. 3473) | | |
| | Wash. (R. 4228, 4235, 4277, 4279) | 3.50 | | | |
| May 1-10 | | | | | |
| | Wash. (R. 4330, 4331) | 3.34 | 3.00 (R. 3475) | | |
| | Wash. (R. 4229, 4282) | 3.50 | | | |
| May 11-20 | | | | | |
| | Wash. (R. 4283, 4284, 4286) | 3.50 | 3.00 (R. 3532) | | |
| May 21-31 | | | | | |
| | Wash. (R. 4285) | 3.38 | 3.65 (R. 3449, 3450) | 4.04 | (R. 4683, 4684) |
| | Wash. (R. 4333) | 4.00 | | | |
| June 1-10 | | | | | |
| | Wash. (R. 4292, 4294, 4295, 4332, 4334, 4335) | 3.34 | 3.00 (R. 3530, 3599, 3600) | | |
| June 11-20 | | | | | |
| | Calif. (R. 2206) | 3.55 | 3.00 (R. 3529, 3360, 3595, | 2.59 | (R. 2055) |
| | Wash. (R. 4293) | 3.50 | 3596, 3597, 3598, 3614) | | (rebilling; was $2.74 R. 2053) |
| June 21-30 | | | | | |
| | Wash. (R. 4260, 4298) | 3.34 | 3.65 (R. 3361, 3362, 3612, | 2.55 | (R. 2057) |
| | Wash. (R. 4261, 4299) | 3.50 | 3613) | | |
| July 1-10 | | | | | |
| | Wash. (R. 4301, 4340) | 3.34 | | | |
| | S.Calif. (R. 2052) | 4.00 | | | |
| July 11-20 | | | | | |
| | Wash. (R. 4306, 4339) | 3.34 | 3.00 (R. 3558, 3593, 3594) | 2.89 | (R. 2058) |
| | Wash. (R. 4303, 4304, 4307, 4341) | 3.50 | | 2.61 | (R. 4685) (Idaho) |
| | Wash. (R. 4308) | 4.16 | | | |
| | No.Calif. (R. 2056) | 3.76 | | | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| | Area | Price | Denver | Salt Lake |
| | | 1961 (con't) | | |
| July 21-31 | | | | |
| | Wash. (R. 4337, 4342) | 3.34 | 3.00 (R. 3591, 3592) | |
| | No.Calif. (R. 2205) | 3.55 | | |
| | So.Calif. (R. 2207, 2208) | 4.04 | | |
| | Wash. (R. 4309, 4312) | 4.16 | | |
| Aug. 1-10 | | | | |
| | Wash. (R. 4314, 4315, 4310) | 4.16 | 3.65 (R. 3508, 3509, 3510) | |
| | No.Calif. (R. 2206) | 3.55 | 3.25 (R. 3468) | |
| Aug. 11-20 | | | 3.65 (R. 3525, 3555, 3556) | |
| Aug. 21-31 | | | | |
| | Wash. (R. 4190) | 3.34 | 3.65 (R. 3589, 3590) | |
| | Wash. (R. 4343) | 3.44 | | |
| | Wash. (R. 4344) | 4.00 | | |
| | Wash. (R. 4316) | 4.16 | | |
| Sept. 1-10 | | | 3.00 (R. 3523) | |

## CONTINENTAL'S PRICE DISCRIMINATIONS

8" pie, per dozen

II

CHERRY*

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| | Area | Price | Denver | Salt Lake |
| | | 1959 | | |
| April 1-10 | | | | |
| | Wash. (R 3808, 3815, 3863) | $4.60 | 3.65 (R. 2913, 2914, 2915, 2916, 2918, 2921, 2923, 2924, 2925) | |
| April 11-20 | | | | |
| | Wash. (R. 3812, 3827, 3819, 3853) | 4.34 | 3.65 (R. 2917, 2927, 2928, 2929) | |
| | Wash. (R. 3817, 3818, 3821, 3822) | 4.60 | | |
| April 21-30 | | | | |
| | Wash. (R. 3828) | 4.36 | 3.65 (R. 2930, 2932, 2933, 2934, 2935, 2939) | |
| | Wash. (R. 3823, 3825) | 4.60 | | |
| May 1-10 | | | | |
| | Wash. (R. 3829, 3831) | 4.60 | 3.65 (R. 2931) | |
| May 11-20 | | | | |
| | Wash. (R. 3832, 3837) | 4.36 | 3.65 (R. 2940) | |
| | Wash. (R. 3833) | 4.60 | | |
| May 21-31 | | | | |
| | Wash. (R. 3836, 3843) | 4.32 | 3.93 (R. 2815) | 4.60 (R. 4652) |

*Source: invoices contained in Pl. Ex. 10; R. 90, 2052; Pl. Ex. 11; R. 90, 2054; Pl. Ex. 12; R. 90, 2055; Pl. Ex. 13; R. 90, 2056; Pl. Ex. 14; R. 114, 2057; Pl. Ex. 35; R. 380, 2205; Pl. Ex. 78, R. 536-537, 2773; Pl. Ex. 79; R. 536-537, 2987; Pl. Ex. 80; R. 536-537, 3355; Pl. Ex. 83; 533, 534, 3617; Pl. Ex. 84; 538, 3796; Pl. Ex. 85; 538, 3796; Pl. Ex. 86; 538, 3984; Pl. Ex. 87; 538, 4188; Pl. Ex. 88; 542, 4373; Pl. Ex. 89; 542, 4405, and for some Salt Lake sales, D. Ex. A-35; R. 1065, 5827, 5842, as indicated.

| Date | High Price Areas (Sales at or above prices shown) Area | Price | Low Price Areas (Sales at prices shown) Denver | Salt Lake |
|---|---|---|---|---|
| | | 1959 (con't) | | |
| June 1-10 | | | | |
| | Wash. (R. 3840, 3846, 3849, 3850) | 4.32 | 3.65 (R. 2943, 2944) | |
| | Oregon (R. 4388, 4389, 4390) | 4.60 | | |
| June 11-20 | | | | |
| | Wash. (R. 3851, 3852, 3854, 3855, 3856, 3857) | 4.32 | 3.65 (R. 2945, 2947) | |
| June 21-30 | | | | |
| | Wash. (R. 3860) | 4.32 | 3.93 (R. 2835, 2836) | |
| July 1-10 | | | 3.65 (R. 2951) | |
| July 11-20 | | | | |
| | Wash. (R. 3867) | 4.60 | 3.67 (R. 2953, 2954) | |
| | Wash. (R. 3866) | 4.32 | | |
| July 21-31 | | | 3.77 (R. 2957) | |
| Aug. 1-10 | | | | |
| | Wash. (R. 3868, 3865) | 4.60 | | |
| Aug. 11-20 | | | | |
| | Wash. (R. 3868) | — | | |
| Aug. 21-31 | | | | |
| | Wash. (R. 3869, 3870, 3876, 3879) | 4.60 | | |
| Sept. 1-10 | | | | |
| | Wash. (R. 3883) | 4.32 | 3.93 (R. 2853) | |
| | Oregon (R. 4396, 4397, 4398, 4399) | 4.60 | | |
| Sept. 11-20 | | | | |
| | Wash. (R. 3886, 3888) | 4.44 | 3.93 (R. 2854, 2855, 2856, 2857) | |
| Sept. 21-30 | | | | |
| | Wash. (R. 3891, 3892) | 4.60 | 3.65 (R. 2858, 2961) | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| | Area | Price | Denver | Salt Lake |
| | | 1959 (con't) | | |
| Oct. 1-10 | | | | |
| | Wash. (R. 3893) | 4.36 | 3.93 (R. 2860, 2862, 2863, | |
| | Wash. (R. 3902) | 4.60 | 2864, 2866, 2867, | |
| | | | 2868) | |
| Oct. 11-20 | | | | |
| | Wash. (R. 3894) | 4.36 | 3.93 (R. 2869, 2870, 2871) | |
| | Wash. (R. 3899, 3901) | 4.60 | | |
| Oct. 21-31 | | | | |
| Nov. 1-10 | | | | |
| | Wash. (R. 3904, 3905) | 4.28 | | |
| Nov. 11-20 | | | | |
| | Wash. (R. 3911, 3912, 3923, 3925) | 4.04 | 3.65 (R. 2971, 2812) | |
| | Wash. (R. 3905, 3917) | 4.28 | | |
| Nov. 21-30 | | | | |
| | Wash. (R. 3981, 3952) | 4.28 | 3.65 (R. 2810, 2974, 2975, 2976, 2977) | |
| Dec. 1-10 | | | | |
| | Wash. (R. 3965, 3971) | 4.28 | 3.65 (R. 2978, 2979, 2980, | |
| | Wash. (R. 3967) | 4.60 | 2981, 2982) | |
| Dec. 11-20 | | | | |
| | Wash. (R. 4184) | 4.00 | | |
| | Wash. (R. 3979, 3987) | 4.12 | | |
| | Wash. (R. 3968, 3971) | 4.28 | | |
| Dec. 21-31 | | | | |
| | Wash. (R. 3973, 4152) | 4.28 | 3.65 (R. 2984) | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| Area | Price | Denver | | Salt Lake |
| | 1960 | | | |
| Jan. 1-10 | | | | |
| Wash. (R. 4145) | 4.12 | | | |
| Jan. 11-20 | | | | |
| Wash. (R. 4145, 4146, 4150, 4151) | 4.12 | 3.80 | (R. 3272, 3273, 3275, 3276) | |
| Wash. (R. 4148, 4149) | 4.28 | | | |
| Jan. 21-31 | | | | |
| Wash. (R. 4156) | 4.04 | 3.35 | (R. 3163) | |
| Calif. (R. 3281) | 4.12 | | | |
| Wash. (R. 4155) | 4.28 | | | |
| Virginia (R. 534) | 3.80 | | | |
| Feb. 1-10 | | | | |
| Wash. (R. 4162, 4173) | 4.00 | 3.35 | (R. 3309, 3310, 3312, 3313) | |
| Wash. (R. 4140, 4154, 4157, 4159, 4160, 4163, 4166) | 4.28 | | | |
| Feb. 11-20 | | | | |
| Wash. (R. 3997, 4132, 4165) | 3.98 | 3.35 | (R. 4410) | |
| Wash. (R. 3994) | 4.28 | | | |
| Feb. 21-29 | | | | |
| Wash. (R. 3995) | 3.98 | 3.35 | (R. 3314) | |
| Wash. (R. 3996, 3998) | 4.28 | | | |
| March 1-10 | | | | |
| Wash. (R. 4177) | 4.04 | 3.50 | (R. 3024) | |
| Wash. (R. 4001, 4003) | 4.28 | | | |
| March 11-20 | | 3.50 | (R. 3025) | |
| March 21-31 | | | | |
| Wash. (R. 4006) | 4.28 | 3.35 | (R. 3031, 3009, 3329) | |
| Wash. (R. 4011, 4012) | 3.80 | | | |
| April 1-10 | | | | |
| Wash. (R. 4015, 4017) | 3.80 | | | |
| April 11-20 | | | | |
| Wash. (R. 4018, 4020) | 3.80 | 3.65 | (R. 3308) | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| | Area | Price | Denver | Salt Lake |
| | | 1960 (con't) | | |
| April 21-30 | | | | |
| | Wash (R. 4025, 4027, 4168, 4170, 4171, 4175, 4180) | 3.63 | 3.10 (R. 4417) | |
| May 1-10 | | | | |
| | Wash. (R. 4133, 4172, 4178) | 3.64 | | |
| May 11-20 | | | | |
| | Wash. (R. 4031, 4179) | 3.64 | 3.35 (R. 3315, 3316, 3328) | |
| May 21-31 | | | | |
| | Wash. (R. 4023, 4036, 4039, 4042) | 3.80 | 3.35 (R. 3325, 3326, 3327, 3329) | |
| June 1-10 | | | | |
| | Wash. (R. 4119) | 3.64 | 3.35 (R. 3323) | |
| June 11-20 | | | | |
| | Wash. (R. 4066) | 3.64 | 3.68 (R. 3330) | |
| June 21-30 | | | | |
| | Wash. (R. 4040, 4064, 4066) | 3.64 | 3.68 (R. 3175) | |
| | Wash. (R. 4053, 4054, 4055, 4057, 4060, 4062, 4063, 4065) | 3.80 | | |
| | Wash. (R. 4037) | 4.48 | | |
| July 1-10 | | | 3.20 (R. 3176, 3177, 3179, 3180, 3182) | |
| July 11-20 | | | | |
| | Wash. (R. 4103) | 3.64 | 3.20 (R. 3183, 3184, 3186, | |
| | Wash. (R. 4046, 4049) | 4.16 | 3187, 3188, 3200, 3202) | |
| July 21-31 | | | 3.20 (R. 3141, 3185, 3189, 3196) | |
| Aug. 1-10 | | | 3.20 (R. 3201) | |
| Aug. 11-20 | | | | |
| Aug. 21-31 | | | 3.20 (R. 3190, 3193) | |
| Sept. 1-10 | | | 3.20 (R. 3212, 3213, 3215, 3216) | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| | Area | Price | Denver | Salt Lake |
| | | 1960 (con't) | | |
| Sept. 11-20 | | | | |
| | Wash. (R. 4072) | 4.16 | 3.65 (R. 3173, 3174) | |
| Sept. 21-30 | | | | |
| | Wash. (R. 4187) | 4.04 | 3.20 (R. 3214, 3215, 3217) | |
| | | | 3.20 (Grand Junction) (R. 3172) | |
| Oct. 1-10 | | | | |
| Oct. 11-20 | | | | |
| | Wash. (R. 4084) | 4.16 | 3.29 (R. 3232) | |
| Oct. 21-31 | | | 3.20 (R. 3170, 3171) | |
| Nov. 1-10 | | | | |
| | Wash. (R. 4073) | 4.00 | | |
| | Wash. (R. 4085) | 4.16 | | |
| Nov. 11-20 | | | | |
| | Wash. (R. 4087) | 4.16 | 3.20 (R. 3249, 3238) | |
| Nov. 21-30 | | | | |
| | Wash. (R. 4120, 4124) | 4.12 | 3.20 (R. 3251) | |
| Dec. 1-10 | | | | |
| | Wash. (R. 4123) | 4.00 | 3.20 (R. 3260, 3261, 3263) | |
| Dec. 11-20 | | | | |
| | Wash. (R. 4122) | 4.00 | | |
| | Wash. (R. 4130) | 4.16 | | |
| Dec. 21-31 | | | | |
| | Wash. (R. 4131) | 4.00 | 3.20 (R. 3168, 3169, 3262) | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| | Area | Price | Denver | Salt Lake |
| | | 1961 | | |
| Jan. 1-10 | | | | |
| Jan. 11-20 | | | | |
| | Wash. (R. 4266) | 4.16 | 3.65 (R. 3422) | |
| Jan. 21-31 | | | | |
| | Wash. (R. 4317) | 4.00 | 3.35 (R. 3419) | |
| | Wash. (R. 4267, 4269) | 4.16 | | |
| Feb. 1-10 | | | | |
| | Wash. (R. 4319) | 4.00 | 3.10 (R. 3480, 3481) | |
| | Wash. (R. 4268) | 4.16 | | |
| Feb. 11-20 | | | | |
| | Wash. (R. 4320, 4322) | 4.04 | 3.10 (R. 3478) | 3.38 (R. 5842) |
| Feb. 21-29 | | | | |
| | Wash. (R. 4321) | 4.00 | | |
| March 1-10 | | | | |
| | Wash. (R. 4270, 4324) | 4.00 | 3.10 (R. 3490, 3491, 3492, | |
| | Wash. (R. 4231) | 4.16 | 3493) | |
| March 11-20 | | | | |
| | Wash. (R. 4273) | 4.16 | 3.25 (R. 3440) | |
| March 21-31 | | | | |
| | Wash. (R. 4326) | 4.04 | 3.80 (R. 3441) | |
| April 1-10 | | | | |
| | Wash. (R. 4276) | 4.16 | 3.65 (R. 3452) | |
| April 11-20 | | | | |
| | Wash. (R. 4278) | 4.16 | 3.65 (R. 3474, 3476, 3477) | 3.40 (R. 5842) |
| | Wash. (R. 4243) | 3.50 | | |
| April 21-30 | | | | |
| | Wash. (R. 4328, 4329, 4281) | 4.00 | 3.10 (R. 3473, 4417) | 4.06 (R. 4682, |
| | Wash. (R. 4235, 4277, 4278) | 4.16 | | 4684) |
| May 1-10 | | | | |
| | Wash. (R. 4331) | 4.00 | 3.10 (R. 3475) | |
| | Wash. (R. 4229, 4287, 4288) | 4.16 | | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | | |
|---|---|---|---|---|---|
| | Area | Price | Denver | | Salt Lake |
| | | 1961 (con't) | | | |
| May 11-20 | | | | | |
| | Wash. (R. 4284, 4288) | 4.16 | 3.10 (R. 3532) | | |
| | Wash. (R. 4289) | 3.50 | | | |
| May 21-31 | | | | | |
| | Wash. (R. 4290) | 3.34 | 3.65 (R. 3450, 3449, 3531) | 4.04 | (R. 4683) |
| | Wash. (R. 4283, 4285) | 3.38 | | | |
| | Wash. (R. 4333) | 4.00 | | | |
| June 1-10 | | | | | |
| | Wash. (R. 4292, 4332) | 3.38 | 3.65 (R. 3527, 3530) | | |
| | Wash. (R. 4334, 4335) | 3.34 | | | |
| | Wash. (R. 4258) | 3.50 | | | |
| June 11-20 | | | | | |
| | Wash. (R. 4264, 4293, 4296) | 3.50 | | | |
| | Wash. (R. 4297) | 3.34 | 3.80 (R. 4416) | | |
| | No.Calif. (R. 2056) | 3.76 | | | |
| | No.Calif. (R. 2206) | 3.55 | | | |
| June 21-30 | | | | | |
| | Wash. (R. 4260, 4298) | 3.34 | | | |
| | Wash. (R. 2054, 4259, 4299) | 3.50 | | | |
| July 1-10 | | | | | |
| | Wash. (R. 4300) | 3.50 | 3.65 (R. 3527) | | |
| | Wash. (R. 4302, 4340) | 3.34 | | | |
| July 11-20 | | | | | |
| | Wash. (R. 4306, 4339, 4341) | 3.34 | 3.10 (R. 3558) | 3.34 | (R. 2058; Idaho) |
| | Wash. (R. 4303, 4304, 4305, 4307) | 3.50 | | | |
| | Calif. (R. 2056) | 3.76 | | | |
| July 21-30 | | | | | |
| | Wash. (R. 4337, 4341, 4342) | 3.34 | | | |
| | No.Calif. (R. 2205) | 3.55 | | | |
| | No.Calif. (R. 2207) | 4.04 | | | |
| | So.Calif. (R. 2208) | 4.11 | | | |

| Date | High Price Areas (Sales at or above prices shown) | | Low Price Areas (Sales at prices shown) | |
|---|---|---|---|---|
| | Area | Price | Denver | Salt Lake |
| | | 1961 (con't) | | |
| Aug. 1-10 | | | | |
| | Wash. (R. 4311, 4315) | 4.16 | | |
| Aug. 11-20 | | | | |
| | No.Calif. (R. 2205) | 3.55 | 3.65 (R. 3525) | |
| Aug. 21-31 | | | | |
| | Wash. (R. 4190) | 3.34 | | |
| | Wash. (R. 4343) | 3.44 | | |
| | Wash. (R. 4263, 4344) | 4.00 | | |
| | Wash. (R. 4316) | 4.16 | | |
| Sept. 1-10 | | | | |
| | Wash. (R. 4345) | 3.04 | 3.10 (R. 3523) | |